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CONSTITUTIONAL LAW – II

(PROVISIONS OTHER THAN FUNDAMENTAL RIGHTS)

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I INTRODUCTION

CASES DECIDED by Supreme Court of India on constitutional issues except on fundamental rights and reported in the year 2011 are being analyzed in this survey. Brevity has been observed while discussing cases involving reiteration of established principles of constitutional law. On the other hand, elaboration echoes in analysis of cases involving notable development in the field of constitutional law. Consequently, elucidation of constitutional principles inherent in constitutional adjudication is also part of this survey. An endeavour has also been made to evaluate and contrast the cases decided this year with earlier decisions wherever the context so required. Diversity in judicial trend cannot be ruled out in adjudication and particularly in the field of constitutional law, and such diversity has also been highlighted if it has been noted in any judicial pronouncement.

II CONSTITUTIONAL SAFEGUARDS TO CIVIL SERVANTS – ARTICLES 310 AND 311

Articles 310 and 311 afford protection to civil servants. These articles provide that penalty in the nature of dismissal; removal or reduction in rank cannot be imposed without holding a proper inquiry or giving a hearing. However, three exceptions are recognized for dispensing with an inquiry in clauses (a) to (c) of 2nd proviso to article 311. No such enquiry is required to be conducted for the purposes of imposition of penalty: (1) when the same relates to dismissal on the ground of conviction on a criminal charge; (2) or where it is not reasonably practicable to hold such an inquiry or (3) where it is not possible to hold an enquiry in the interest of the security of the state.[1]

Not reasonably practicable to hold enquiry

The question whether it was reasonably practicable to hold the enquiry or not must be judged in the context and circumstances of each case. It is a matter of

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1 For extent and scope of applicability these exceptions and the remedies available to government servants aggrieved by penalties imposed under these clauses see, *Union of India* v. *Tulsi Ram Patel* (1985) 3 SCC 398.

assessment to be made by disciplinary authority and must be judged in the light of circumstances prevailing. The disciplinary authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of the prevailing situation that clause (3) of article makes the decision of the disciplinary authority on this question final. Further, it is not possible to exhaustively enumerate the cases in which it would not be reasonably practicable to hold the enquiry. Illustrative cases would be where a civil servant: (a) terrorizes, threatens or intimidates witnesses; (b) threatens, intimidates and terrorizes the officer who is the disciplinary authority or members of his family; and (c) where an atmosphere of violence or of general indiscipline and insubordination prevails, it being immaterial whether the concerned civil servant is or is not responsible to bring about such a situation.[2] The decision in *Ajit Kumar* v. *State of Jharkhand*[3] is another example highlighting a situation when it is not reasonably practicable to hold enquiry. In this case the officer concerned was working as subordinate judge and during the course of inspection by the inspecting judge it was found that the subordinate judge did not use to prepare judgments on his own, he used to get them prepared through somebody else before delivering the judgments. The high court was of the opinion that it was not possible to hold an enquiry in this case in view of the fact that if an enquiry was held the same may lead to the question of validity of several judgments rendered by the subordinate judge and recommended his removal from service. The reason recorded by the high court was held to be a legal and valid ground for not holding an enquiry.[4] Incidentally it should be noted that as far back as in 1981 the Supreme Court has ruled that even if the appointment of a judge is found to be invalid, judgments and orders made by him would continue to be valid under *defacto* doctrine.[5]

Reasons for imposing penalty

It is settled law that if the empowered authority dispenses enquiry under clause (b) *i.e*. on the ground that it is reasonably practicable to hold enquiry it is obligatory to record reasons therefor and it is not necessary to communicate the same to the civil servant.[6] In *Union of India* v. *M.M. Sharma*[7] the court held that unlike sub-clause (b) sub-clause (c) does not specifically prescribe for recording of reasons but at the same time there must be records to indicate that there are sufficient reasons for dispensing with the enquiry in the interest of the security of the state.[8] The court considered the question whether it was obligatory on the part of the disciplinary authority to communicate reasons for imposing penalty of dismissal? In this case an employee of Indian embassy while on special assignment came under adverse notice and was found to be involved in an unauthorized and undesirable liaison

2 *Satyavir Singh* v. *Union of India* (1985) 4 SCC 252 at 270.
3 (2011) 11 SCC 458.
4 *Id*. at 462.
5 See, *Gokaraju Rangaraju Reddy* v. *State of Andhra Pradesh* (1981) 3 SCC 132.
6 See *Satyavir Singh* v. *Union of India* (1985) 4 SCC 252 and *Union of India* v. *Tulsi Ram Patel* (1985) 3 SCC 398.
7 (2011) 11 SCC 293.
8 *Id.* at 298.

with foreign nationals of host country. On his dismissal without enquiry under clause (c) i.e. in the interest of security of state, the high court directed the union of India to give reasons for levying the penalty of dismissal and not any other penalty. Setting aside the order of the high court it was ruled that for taking action in due discharge of its responsibility for exercising powers under sub-clause (a) (b) or (c) it is nowhere provided that the disciplinary authority must provide reasons indicating application of mind for awarding punishment of dismissal. In such a situation it is not mandatory that the impugned order should mandatorily disclose the reasons for taking action of dismissal of his service and not any other penalty. If in term of the mandate of the Constitution, the communication of the charge and holding of an enquiry could be dispensed with, in view of the interest involving security of the state, there is equally for the same reasons no necessity of communicating the reasons for arriving at the satisfaction as to why the extreme penalty of dismissal is imposed on the delinquent officer.[9]

III DEFECTION AND DISQUALIFICATION – ROLE AND POWER OF SPEAKER – X SCHEDULE

Impeccable functioning is expected from constitutional functionaries holding high public offices. When an order is passed by a high constitutional functionary *prima facie* it is in the *bona fide* zone. However, if the court comes to the conclusion that the power has not been exercised honestly and fairly then there would be no alternative with the court but to interfere with the order passed. The role of speaker of Karnataka legislative assembly was examined by the Supreme Court in *Balchandra L. Jarkiholi* v. *B.S. Yedurappa*[10] with regard to an order of disqualification of some members of the Karnataka Legislative Assembly passed under Karnataka Legislative Assembly (Disqualification of Members on Ground of Defection) Rules, 1986. Thirteen members of the assembly wrote identical letters to the Governor indicating that as members of BJP they had become disillusioned with the functioning of the government headed by the chief minister. They alleged that there was widespread corruption, nepotism, favouritism, abuse of power and misuse of government machinery in the functioning of the government and that a situation had arisen when the governance of the state could not be carried on in accordance with the provisions of the Constitution. Accordingly, they were withdrawing support from the government with a request to the governor to intervene and to institute the constitutional process as the constitutional head of the state. Two MLAs retracted the withdrawal of support. On the application of the chief minister the speaker passed on order disqualifying the members on the ground of defection excepting two MLAs who had later retracted their statement. The speaker passed an order of disqualification under para 2(1)(a) of the tenth schedule to the Constitution on the ground that withdrawing support and acting against the leader of the party under which they had been elected, amounts to violation of the object of the tenth schedule. On facts the court found (1) speaker allowed state president

9 *Id.* at 301.
10 (2011) 7 SCC 1.

of the BJP, who was not even a party to the proceedings, to file affidavit adverse to the appellants; (2) the appellant-MLAs were not served with notices directly, but the same were posted on the outer doors of their quarters in the MLA complex; (3) copies of documents and annexure relied on in support of the disqualification order were not served on the appellants; (4) only 3 days' time was granted to file the reply while the rule 7(3) of the disqualification rules required 7 days' period; (5) appellants were treated discriminatorily as against two MLAs who had later retracted their statement; and (6) relied on media report against the appellants. Setting aside the order of the speaker, court ruled that extraneous considerations are writ large on the face of the order of the speaker.[11] Not only the speaker's order amount to denial of the principles of natural justice to the appellants, but it also reveals a partisan trait in his approach in disposing of the application of disqualification filed by the chief minister.[12] The procedure adopted by the speaker seems to indicate that he was trying to meet the time schedule set by the Governor for the trial of strength in the assembly and to ensure that the appellants and the other independent MLAs stood disqualified prior to the date on which the floor test was to be held.[13] The court ruled that the conclusion arrived by the speaker does not find support from the contents of the letter of the MLAs so as to empower the speaker to take such a drastic step as to remove the appellants from the membership of the house.[14] The court emphasized that the object of para 5 of the tenth schedule is to ensure that the speaker, while holding office, acts absolutely impartially, without any leaning towards any party, including the party from which he was elected to the house.[15]

IV GOVERNANCE AND CONSTITUTIONAL ETHOS

Adherence to constitutional ethos and values is not only a pre-requisite for government in order to ensure good governance but also a judicial obligation to ensure enforcement of such ethos and values in case it is abdicated by the government of the day. The apex court has reiterated that as constitutional adjudicator it has always to be mindful of preserving the sanctity of constitutional values. In performing its role as an adjudicator court should be guided by the constitutional values. The primordial value is that it is the responsibility of the every organ of the state to function within the four corners of the constitutional provisions.[16] On some of the important national issues, discussed herein below, pertaining to the governance by state the apex court has reiterated the importance and necessity of constitutional ethos.

Black-money – bringing back foreign funds into India

In *Ram Jethmalani* v. *Union of India*[17] the court considered the question whether the task of bringing foreign funds into India override all other constitutional concerns

11 *Id.* at 44.
12 *Id*. at 37.
13 *Id.* at 42.
14 *Id*. at 36.
15 *Id.* at 44.
16 *Nandini Sundar* v. *State of Chhattisgarh* (2011) 7 SCC 547.
17 (2011) 8 SCC 1.

and obligations?[18] Some eminent citizens filed a writ petition relating to issues of large sums of unaccounted money held by certain individuals in foreign banks. The court directed the Union of India (i) that the high level committee constituted by it be converted into a special investigation team, headed by two retired judges of the Supreme Court of India; (ii) to forthwith disclose to the petitioners all those documents and information which they have secured from Germany except the names of those individuals with respect to whom enquiries/investigations are still in progress and no information or evidence of wrongdoing is yet available.[19] Expressing its concern the court observed that unaccounted money, especially large sums held by nationals and entities with a legal presence in the nation, in banks abroad, especially in tax heavens or in jurisdictions with a known history of silence about sources of money, clearly indicate a compromise of the ability of the state to manage its affairs in consonance with what is required from a constitutional perspective.[20] The court expressed its serious reservations about the responses of the union of India stating that during the earlier phases of hearing responses were clearly evasive, confused, or originating in the denial mode.[21] In connection with the direction of special investigation team headed by two retired judges of the Supreme Court, the court ruled that the continued involvement of the court in these matters, in a broad oversight capacity, is necessary for upholding rule of law and achievement of constitutional values.[22] Our people may be poor, and may be suffering from all manner of deprivation, the protection of the Constitution and its vision and values is an elemental mode of service to our people.[23]

The Union of India pleaded its inability to disclose the obtained information under the Indo-German double taxation treaty. The court ruled that the fact that such treaties are drafted by diplomats, and not lawyers, leading to sloppiness in drafting also implies that care has to be taken not to render any word, phrase, or sentence redundant, especially where rendering of such word, phrase or sentence redundant would lead to a manifestly absurd situation, particularly from a constitutional perspective. The government cannot bind India in a manner that derogates from constitutional provisions, values and imperatives.[24] It is well-recognized proposition that we are increasingly being entwined in a global network of events and social action. Considerable care has to be exercised in this process, particularly where government which come into being on account of a constitutive document, enter into treaties. The actions of government can only be lawful when exercised within the four corners of constitutional permissibility. No treaty can be entered into, or interpreted, if constitutional fealty is derogated from.[25] The court also refused to accept the petitioners' plea that details of those persons against whom enquiries have not been completed may also be disclosed by carving out an

18 *Id.* at 24.
19 *Id*. at 38.
20 *Id*. at 14.
21 *Id.* at 22.
22 *Id.* at 26.
23 *Id.* at 26-27.
24 *Id.* at 32.
25 *Id.* at 35.

exception to the right of privacy. It ruled that one of the chief dangers of making exceptions to principles that have become a part of constitutional law, through aeons of human experience, is that the logic, and ease of seeing exceptions would become entrenched as a part of constitutional order. It further ruled that one can appreciate the fact that the situation with respect to unaccounted money is extremely grave. Nevertheless, as constitutional adjudicator this court always have to be mindful of preserving the sanctity of constitutional values, and hasty steps that derogate from fundamental rights, whether urged by governments or private citizens howsoever well meaning they may be, have to be carefully scrutinized. The problem of abrogation of one set of constitutional values cannot be solved by creating the problem of abrogation of another set of constitutional values.[26]

"Salwa Judum"

In *Nandini Sundar* v. *State of Chhattisgarh*[27] the court reiterated that we must bear the discipline, and the rigour of constitutionalism, the essence of which is accountability of power, whereby the power of the people vested in any organ of the state, and its agents, can only be used for promotion of constitutional values and vision. State of Chhattisgarh, with the approval of Union of India, appointed tribal youths as special police officers (SPOs) for counter-insurgency activities against maoists/naxalites. The tribal youths as SPOs are sometimes called Koya Commandos, or the Salwa Judum. The appointment process indicated that no minimum educational qualification was prescribed but preference was given to those who had passed fifth class. 42 hours training was given to those who had passed fifth class, and one month extra training was given to those who had not. Firearms were also provided to them. Their duties placed them in a position where their lives were in equal or more danger than that faced by regular police officers. These special officers were paid remuneration limited to honorarium of Rs.3000 per month of which 80% was contributed by government of India. Special preference was given to victims of naxal violence in recruitment of SPOs by Chhattisgarh Government. Holding the appointment of SPOs as unconstitutional the court ruled that the strand of governmental action seems to have been evolved out of the darkness that has begun to envelope our policy makers, with increasing blindness to constitutional wisdom and values.[28] Socio-economic policies that cause vast disaffection amongst the poor, creating conditions of violent politics is a proscribed feature of our Constitution. The government arrived at such a situation, on account of such policies, and then claim that there are not enough resources to tackle the socio-political unrest, and violence, within the framework of constitutional values. It amounts to its abdication of constitutional responsibilities.[29] Using the tribal youngsters, SPOs to participate in counter-insurgency actions against maoists, even though they do not have the necessary levels of education and capacities to learn

26 *Id.* at 36; also see *GVK Industries* v. *Income Tax Officer* (2011) 4 SCC 36 (powers and claim of supremacy must be exercised within the four corners of constitutional permissibility, values and scheme).

27 (2011) 7 SCC 547.

28 *Id.* at 561.

29 *Id.* at 563.

the necessary skills, clearly indicates that issues of finance have overridden other considerations such as effectiveness of such SPOs and of constitutional values.[30] Many SPOs are also affected by naxal violence. To direct them into counter-insurgency activities, in which those youngsters are placed in grave danger of their lives, runs contrary to the norms of nurturing society. That some misguided policy-makers strenuously advocate this as an opportunity to such dehumanized sensibilities in fight against maoists ought to be a matter of gravest constitutional concern and deserving of the severest constitutional, opprobrium.[31] 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.[32] In coming to the conclusion, the court was guided by the facts and constitutional values. The judiciary intervenes in such matters in order to safeguard constitutional values and goals, and fundamental rights such as right to equality, the right to life. Indeed, such expertise and responsibilities vest in the judiciary.[33]

V HIGH COURTS' CONTROL OVER SUBORDINATE JUDICIARY – COMPULSORY RETIREMENT OF JUDICIAL OFFICERS – ARTICLE 235 AND 239 -AA (4)

Under article 235 the control over the subordinate judiciary is vested in the high court. The control is exclusive in nature, comprehensive in extent and comprehends a wide variety of matters. Last year the Supreme Court emphasized that proper scrutiny and care is warranted in appointing district judges.[34] In the year under survey the court has emphasized the need to keep stream of justice unpolluted. For this purpose repeated scrutiny of service records of judicial officers as per service rules is essential so that 'dead wood can be chopped' *i.e*. order of compulsory retirement can be passed against the concerned subordinate judicial officer. The court upheld the order of compulsory retirement passed against three judicial officers of the Delhi judicial service in *Rajendra Singh Verma* v. *L.G. N.C.T. of Delhi.*[35] Apart from the poor judicial performance, the appellants in the instant case were also found to be of doubtful integrity. There are two important aspects of the case which are discussed hereinafter.

Constant vigilance by high court

As the case related to doubtful integrity of three judicial officers, the first aspect of the case was reiteration of the duty of the high court to maintain constant vigil on

30 *Id.* at 580.
31 *Id.* at 579.
32 *Id.* at 583.
33 *Id.* at 584; also see, *Harjinder Singh* v. *Punjab Warehousing Corporation* (2010) 3 SCC 192 (court must ensure constitutional ethos should not to be sacrificed by the glitz and glare of globalization).
34 See, *Kazia Mohammed Muzzammil* v. *State of Karnataka* (2010) 8 SCC 155 and *Rajesh Kohli* v. *High Court of Jammu and Kashmir* (2010) 12 SCC 783.
35 2011 (10) SCC 1.

its subordinate judiciary. Relying on an earlier case the court reiterated that "the lymph nodes (cancerous cells) of corruption constantly keep creeping into the vital veins of the judiciary and need to stem it out by judicial surgery lies on the judiciary itself by its self-imposed or corrective measure or disciplinary action under the doctrine of control enshrined in articles 235 and 124 (6) of the Constitution".[36] The expression 'judicial surgery' obviously includes weeding out a judicial officer who is of doubtful integrity by passing order of compulsory retirement. The logic is that the judicial service is not a service in the sense of an employment as it is commonly understood. Judges discharge their functions while exercising the sovereign judicial power of the state. Their honesty and integrity is expected to be beyond doubt. It should be reflected in their overall reputation. There is no doubt that the nature of judicial service is such that it cannot afford to suffer continuance in service of persons of doubtful integrity or who have lost their utility.[37] Judicial decisions are eloquent testimony to the fact that the authority of high court over subordinate judges and courts has great dynamism for it includes various elements.[38] One more aspect of dynamism was included in the instant case.

Governor's order of compulsory retirement without aid and advice of council of ministers

Another aspect of the case is that while passing the final order of compulsory retirement against a judicial officer the Lt. Governor is not required to act on the aid and advice of his council of ministers under article 239-AA(4).[39] On the other hand he has to act only on the recommendations of the high court. An action of passing compulsory retirement against a judicial officer consists of two parts. Under the first part a decision to that effect has to be taken by the high court in view of article 235 of the Constitution. The second part is that a formal order has to be passed by the Lt. Governor or Governor as the case may be on the basis of recommendations made by the high court. The court reiterated that in the matter of compulsory retirement of a judicial officer the Governor cannot act on the aid and advice of the council of ministers but has to act only on the recommendation of the high court.[40] The Governor could not have passed any order on the aid and advice

36 The court referred to its earlier judgment in *High Court of Judicature of Bombay* v. *Shirishkumar Rangrao Patil* (1997) 6 SCC 339.

37 *Supra* note 35 at 43.

38 See, *Kazia Mohammed Muzzammil* v. *State of Karnataka*, *Supra* note 34; *Rajesh Kohli* v. *High Court of Jammu and Kashmir*, *Supra* note 34 (maintenance of satisfactory level of service conditions including service records of judicial officers) and *R.K. Anand* v. *Delhi High Court* (2009) 8 SCC 106 (power to monitor criminal trials to ensure that criminal trials are not hijacked by powerful and influential accused).

39 This article was inserted by the Constitution (Sixty-ninth Amendment) Act, 1991 enacting special provisions with respect to Delhi.

40 In coming to that conclusion the court referred to earlier cases on point: *M.M. Gupta* v. *State of Jammu and Kashmir* (1982) 3 SCC 412; *State of Haryana* v. *Inder Prakash Anand* (1976) 2 SCC 977; *Baldev Raj Guliani, Punjab and Haryana High Court* (1976) 4 SCC 201; *High Court of Madras R. Rajiah* (1988) 3 SCC 211; *High Court of Orissa* v. *Sisir Kanta Satpathy* (1999) 7 SCC 725; *Tej Pal Singh* v. *State of U.P.* (1986) 3 SCC 604; *Stare of U.P*. v. *Batuk Deo, Pati Tripathi* (1978) 2 SCC 102 and *T. Lakshmi Narasimha Chari* v. *High Court of A.P*., 1996 (5) SCC 90. In particular it explained the

of the council of ministers in this case. The advice should be of no authority except that of the high court in the matter of judicial officers. This is plain implication of article 235. Reliance on article 239-AA (4) is entirely out of place so far as the high court deals with the judicial officers. To give any other interpretation to article 239-AA (4) will be to defeat the supreme object underlying article 235 of the Constitution specially intended for protection of the judicial officers and necessarily independence of the subordinate judiciary. There is no room for any outside body between the Governor and the high court.[41] It is clear from the terminology used in article 235. The "control" vested in the high court is a mechanism to ensure independence of subordinate judiciary. The control over the subordinate judiciary in the high court is exclusive in nature, comprehensive in extent and effective in operation and it is to subserve a basic feature of the Constitution *i.e.* independence of judiciary.[42] The scheme envisaged by the Constitution does not permit the state to encroach upon the area reserved by articles 233, 234 and the first part of article 235 either by legislation or rules or executive instructions. The high court alone is sole authority competent to initiate disciplinary proceedings against the subordinate judicial officers or to impose various punishments including passing of order of compulsory retirement after verification of service record. The state is not competent to aid and advise the Governor on such subjects.[43]

VI IMPEACHMENT OF HIGH COURT JUDGE – INQUIRY PROCEDURE UNDER ARTICLES 217 AND 124

A judge of the high court may be removed from his office by the President after impeachment in the manner provided in clause (4) of article 124. Notice for impeachment can be given either in the house of the people or in the council of states. The speaker or, as the case may be, the chairman may either admit the motion or refuse to admit the same.[44] During the year under survey year two cases were decided by the Supreme Court regarding impeachment of justice P.D. Dinakaran, Chief Justice of the Karnataka High Court. In the case of *P.D Dinakaran* v. *Judges Inquiry Committee*[45] the Supreme Court has sounded a note of caution and stressed the importance of responsibility of the members of parliament while submitting the notice of motion for impeachment. An investigation into the allegation of misbehaviour or incapacity of a judge is an extremely serious matter. The members of the Lok Sabha or the Rajya Sabha are men of wisdom. They would submit a notice of motion for presenting an address to the President of India for removal of a judge only when they are *prima facie* satisfied that there exists tangible material

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ratio of *Shamsher Singh* v. *State of Punjab* (1974) 2 SCC 831 stating it is incorrect to say that in view of *Shamsher Singh's* case the Governor is bound to act as per the aid and advice of the council of ministers and not on the recommendation of the high court.

41 *Supra* note 35 at 61.

42 *Id.* at 48.

43 *Id.* at 49.

44 See, s. 3 of the Judges (Inquiry) Committee Act, 1968.

45 (2011) 8 SCC 474.

warranting an investigation into the allegation of misbehaviour or incapacity of the judge. When a motion is submitted, the speaker or the chairman, as the case may be, is not bound to admit the same as a matter of course. He may, after consulting such persons as he may think fit and considering the material, if any made available to him, take decision on the admission of motion. In a given case, he may refuse to admit the motion. In the aforesaid case validity of procedure adopted by the inquiry committee appointed under Judges (Inquiry) Act, 1968 was in question. Various points concerning validity of procedure adopted by the committee mentioned hereunder were considered.

Advocate's assistance to committee

The petitioner, a judge against whom enquiry proceedings were initiated, sought annulment of the proceedings of the inquiry committee on the ground that the central government had wrongly invoked section 3(9) of the 1968 Act for appointing a senior advocate to assist the inquiry committee. The court rejected the contention holding that in exercise of the power vested in it to regulate its procedure the committee constituted under section 3(2) consists of one person chosen from among the chief justice and other judges of the Supreme Court, one from among the chief justice of the high courts and one distinguished jurist. In the very nature of their functioning, the chief justice or the judge of the Supreme Court and the chief justice of the high court cannot on their own make investigation and assume the role of the prosecutor. The same is true of the distinguished jurist appointed under section 3(2) (c) of the 1968 Act. They would always need assistance of a person who possesses a legally trained mind. That person has to assist the committee in various matters including recording of evidence. The judge against whom the investigation is made is entitled to seek assistance of an advocate and there is no likelihood of any prejudice being suffered by him if the committee seeks assistance of an advocate for effectively discharging the functions entrusted to it under the Act.[46]

Conducting a preliminary enquiry

The inquiry committee constituted under section 3(2) of 1968 Act, did not frame charges on the basis of allegations leveled in notice of motion admitted by Chairman Rajya Sabha. Instead the committee conducted a preliminary inquiry regarding the leveled allegations prior to framing of charges. It was argued on behalf of the petitioner-judge that by making preliminary enquiry prior to the framing of charges, the committee has acted in violation of the scheme of the Act. The court ruled the investigation contemplated under section 3 is a participatory investigation in which the judge against whom charges are framed is entitled to full opportunity to defend himself. There is no bar against making of preliminary enquiry by the committee as a prelude to the framing of definite charges under section 3(3). If the court were to accept the submission that before framing definite charges, the committee cannot make preliminary inquiry then it would have been obliged to frame charges with reference to all the allegations including those relating to the judicial orders passed by the petitioner-judge and administrative power exercised by him in the capacity of Chief Justice and this could easily be construed as a direct

46 *Id.* at 494.

encroachment upon the independence of the judiciary.[47] Provisions of the 1968 Act, also substantiate this view. A conjoint reading of sections 3(4), (8) and second part of section 4 makes it clear that while making the investigation, the committee has to act in consonance with the rules of natural justice. The committee is required to communicate the charges framed under section 3(3) together with a statement of the grounds on which the charges are based to the Judge, give reasonable opportunity to him to present a written statement of defence, to cross-examine the witnesses examined in support of the charges, to produce evidence and to be heard in his defence. There is nothing in the Act or the rules, which inhibits the committee from making preliminary inquiry for the purpose of *prima facie* satisfying that the allegations contained in the notice of motion warrant framing of one or more charges against the judge.[48]

Framing the charge

The court also emphasized the duty of the inquiry committee while framing the charges against the judge. The use of the expression "definite charges" in section 3(3) of the 1968 Act gives a clear indication that before framing the charges, the committee must apply mind to the allegations contained in the notice of motion and the accompanying material for the purpose of forming an opinion that a case is made out for framing charge. The statute does not contemplate that the committee should frame charges against the judge with reference to all the allegations enumerated in the notice of motion or the accompanying statement without even *prima facie* looking into the nature of allegations and satisfying itself that there is justification for framing the particular charges. It will be naïve to contend that the committee has no discretion in the matter of framing charges. Rather, the committee is duty bound to carefully scrutinize the material forming part of the notice of motion and then frame definite charges.[49]

***Nemo debet esse judex in propria causa*: Bias**

The other case *viz*. *P.D. Dinakaran* v *Judges Inquiry Committee*[50] involved the application of the principle *Nemo debet esse judex in propria causa. i.e*. the deciding authority must be impartial[51] and without bias. The petitioner-judge contended that one of the members of the inquiry committee, P.P. Rao, an advocate was biased against him because he in a seminar organized by the bar association of India demanded an inquiry against the judge. He also drafted a resolution opposing elevation of the judge to the Supreme Court. The court found that plea raised was a belated one. The right available to the petitioner-judge to object to the appointment of P.P. Rao in the committee was personal to him and it was always open to him to waive the same. The petitioner knowingly remained silent for about ten months but raised plea of bias only after receiving the notice from the committee to answer

47 *Id.* at 493.
48 *Id.* at 492.
49 *Id.* at 493.
50 (2011) 8 SCC 380.
51 For interesting discussion, see, Debra Lyn Bassett and Rex R. Perschbacher, "The Elusive Goal of Impartiality" 97 (1) *Iowa LR* 181 (2011).

charges against him and therefore by his conduct he had waived his right. Consequently, it was not possible to entertain his plea that constitution of the committee should be declared null on the ground of bias.[52]

Though the court refused to quash the order constituting the inquiry committee yet it directed the chairman to nominate another distinguished jurist in place of Shri P.P. Rao and thus applied the principle of *Nemo debet esse judex in propria causa*. It came to the conclusion that the fact that P.P. Rao demanded inquiry against the judge and was signatory to a representation opposing his elevation to the Supreme Court could give rise to a reasonable apprehension in the mind of an intelligent person that Shri Rao was likely to be biased. The court stated that it is true that the judges and lawyers are trained to be objective and have the capacity to decipher grain from the chaff, truth from the falsehood and there is no doubt that P.P. Rao possesses these qualities. There is agreement with the committee that objection by both sides perhaps "alone apart from anything else is sufficient to confirm his impartiality". However, the issue of bias has not to be seen from the viewpoint of this court or for that matter the committee. It has to be seen from the angle of a reasonable, objective and informed person. What opinion would he form? It is this apprehension which is of paramount importance.[53] The court ruled that in India, the courts have, by and large, applied the 'real likelihood test' for deciding whether a particular decision of the judicial or quasi-judicial body is vitiated due to bias.[54] The court discussed how the rule of bias has been applied by the courts of common law jurisdiction. It also referred to decisions of the courts in England, Constitutional Court of South Africa and Australia.

VII NATIONAL COMMISSION FOR SCHEDULED TRIBES – ARTICLES 338 AND 338-A

Caste/status certificate – commissions' power to judge genuineness.

Article 338 of the Constitution of India mandates the constitution of a national commission for scheduled castes and article 338-A mandates the constitution of a national commission for scheduled tribes. Before insertion of article 338-A article 338 provided for a national commission for scheduled castes and scheduled tribes.

52 *Supra* note 50 at 430. On waiver the court referred to earlier judgments in: *Lachoo Mal* v. *Radhey Shyam* (1971) 1 SCC 619; *Manek Lal* v. *Dr. Prem Chand Singhvi*, AIR 1957 SC 425; *Vyvyan* v. *Vyvyan*, 54 ER 813 and *Dhirendra Nath Gorai* v. *Sudhir Chandra Ghosh*, AIR 1964 SC 1300.

53 *Supra* note 50 at 428. *Cf.* Debra Lynn Bassett and Rex R. Perschbacher 'The Elusive Goal of Impartiality" *Supra* note 51. Observing that public confidence in the judiciary does not result from the judiciary's perception of impartiality; it results from the public's perception of impartiality.

54 *Supra* note 50 at 423. On this point the court referred to earlier judgments: *Manak Lal* v. *Dr. Prem Chand Singhvi*, *Supra* note 52; *A.K. Kraipak* v. *Union of India* (1969) 2 SCC 262; *S. Parthasarathi* v. *State of A.P.* (1974) 3 SCC 459; *G. Sarna* v. *University of Lucknow* (1976) 3 SCC 585; *Ashok Kumar Yadav* v. *State of Haryana* (1985) 4 SCC 417; *Ranjit Thakur* v. *Union of India* (1987) 4 SCC 611; *Secretary to Government, Transport Department* v. *Munuswamy Mudaliar,* 1988 Suppl. SCC 651 and *Bihar State Mineral Development Corporation* v. *Encon Builders* (2003) 7 SCC 418.

In *Collector* v. *Ajit Jogi*[55] the court ruled that the national commission has no jurisdiction to entertain complaints about the genuineness of the caste certificate of a particular individual and pronounce upon the validity of the caste certificate and the caste status of such person. The national commission examined the genuineness of the scheduled tribe certificate in possession of Ajit P.K. Jogi, former Chief Minister of Chhattisgarh, which enabled him to become an MLA from a constituency reserved for the scheduled tribes. Relying on clause (5) of article 338 which provided that 'it shall be the duty of the commission to inquire into specific complaints with respect to the deprivation of rights and safeguards of the scheduled castes and scheduled tribes' the national commission ruled that it was fully empowered to enquire into any complaint relating to the genuineness of the ST certificate. The high court reversed the decision of the commission. Supreme Court upheld the view taken by the high court and ruled that it is evident from article 338 as it originally stood, that the commission was constituted to protect and safeguard the persons belonging to scheduled castes and scheduled tribes by ensuring: (i) anti-discrimination, (ii) affirmative action by way of reservation and empowerment, and (iii) redressal of grievances. The duties under clause 5(b) of article 338 do not extend to either issue of caste/tribe certificate or to revoke or cancel a caste/tribe certificate or to decide upon the validity of the caste certificate. The power to enquire into "deprivation of rights and safeguards of the scheduled castes and scheduled tribes" did not include the power to enquire into and decide the case/tribe status of any particular individual.[56] The same is the position even under article 338-A (which was subsequently inserted) providing for a separate commission for scheduled tribes with identical duties.[57] If such a complaint was received about the deprivation of the rights and safeguards, it will have to refer the matter to the state government or the authority concerned for verification of caste/tribal status, to take necessary action.[58] Therefore, commission should have referred the matter to state government or scrutiny committee for disposal in accordance with the scheme formulated by the Supreme Court in *Madhuri Patil* v. *Commissioner, Tribal Development*[59] wherein the Supreme Court formulated a scheme for verification of tribal status and held that any application for verification of tribal status as a scheduled tribe should be carried out by scrutiny committees constituted by the appropriate government.

VIII PARDON POWER OF GOVERNOR – ARTICLE 161

Articles 72 and 161 of the Constitution confer power on the President and the Governor to grant pardon etc. The aforesaid power like all public power is amenable to limited judicial review[60] on various grounds.[61] Power to pardon, grant remission

55 (2011) 10 SCC 357.
56 *Id.* at 366.
57 *Id.* at 369.
58 *Ibid.*
59 (1994) 6 SCC 241.
60 *Maru Ram* v. *Union of India* (1981) 1 SCC 107.
61 For grounds of review see, *Satpal* v. *State of Haryana* (2000) 5 SCC 170 and *Epuru Sudhakar* v. *Government of A.P.* (2006) 8 SCC 161.

and commutation sentence of being of the greatest importance for the liberty of the citizen, cannot be a law unto itself but must be done in accordance with finer canons of constitutionalism.[62] Consideration of all the relevant facts is a conditions precedent for the exercise of the power.

Consideration of relevant facts

If the Governor is not aware of general considerations such as period of sentence undergone by the convict, his conduct and behaviour while undergoing sentence and such other material considerations, it would make the order of the Governor under article 161 arbitrary and irrational. The decision in *Narayan Dutt* v. *State of Punjab*[63] reiterates this point. In this case the Governor while passing pardon order did not consider relevant aspect. Before the Governor could pass the order of pardon, the accused persons filed appeals against the order of conviction and sentence and the same were pending before the high court. This was a relevant fact for the Governor to take into consideration before exercising his power of pardon. In the order of the Governor there was no reference to this fact. Therefore, the court inferred that all relevant facts were possibly not placed before the Governor.[64]

Pronouncing upon the guilt of the accused: Trenching upon judicial power

The Governor's power of granting pardon under article 161 being an exercise of executive function is independent of the court's power to pronounce on the innocence or the guilt of the accused. The judicial power of a court of law in a criminal trial and subsequent right of appeal up to Supreme Court and the executive power of the President/Governor operate in totally different arenas. The nature of these two powers are also totally different from each other. One should not trench upon the other. A vital aspect in the order of the Governor in *Narayan Dutt's* case[65] was that there were some observations about the guilt or innocence of the accused persons who prayed for pardon. It is well settled that to decide on the innocence or otherwise of an accused person in a criminal trial is within the exclusive domain of a court of competent jurisdiction as this is essentially a judicial function. By pronouncing upon the innocence of the accused, the order of the Governor exceeded the permissible constitutional limits under article 161. Consequently, the matter was remanded back to the Governor for reconsideration.[66]

IX PARLIAMENT – POWER TO LEGISLATE EXTRA-TERRITORIAL LAWS – ARTICLE 245

The scope and extent of power of Parliament to legislate extra-territorial laws was considered in *GVK Industries Ltd.* v. *Income Tax Officer.*[67] The court ruled that

62 *Supra* note 60.
63 (2011) 4 SCC 353.
64 *Id.* at 362. Also see, *Dhananjoy Chatterjee* v. *State of West Bengal* (2004) 9 SCC 751. (Failure to bring all material facts, including the mitigating factors, to the notice of Governor vitiates his decision).
65 *Supra* note 63.
66 *Id.* at 362-63.
67 (2011) 4 SCC 36.

because of interdependence and the fact that many extra territorial aspects or causes have an impact on or nexus with the territory of the nation-state, it would be impossible to conceive legislative powers and competence of national parliaments as being limited only to aspects or causes that arise, occur or exist or may be expected to do so, within the territory of its own nation-state. Constitution imposes affirmative obligations on all the organs of the state to protect the interests, welfare and security of India. Parliament is empowered to enact laws that serve such purposes. Hence, even those extra-territorial aspects or causes, provided they have a nexus with India, and should be deemed to be within the legislative competence of Parliament, except to the extent the Constitution itself specifies otherwise.[68] Court recognizes the impact of changing global scenario giving rise to inter-territorial dependence. Global criminal and terror networks are examples of how events and activities in a territory outside one's own borders could affect one's interests, welfare, well-being and security. The court also cited other examples of such inter-territorial dependence.[69] As many extra-territorial aspects or causes may have an impact on or nexus with the nation-state, they would legitimately, and indeed necessarily, be within the domain of legislative competence of the national Parliament, so long as the purpose or object of such legislation is to benefit people of that nation-State.[70] Explaining the ratio in *Electronics Corporation of India Ltd* v. *C.I.T*[71] the court ruled that it is incorrect to narrow the ambit of clause (1) of article 245 by substituting the word "in" or "within", as prepositions, in the place "for" in the text of article 245. The consequence of such a substitution would be that Parliament could be deemed not to have the powers to enact laws with respect to extra-territorial aspects or causes, even though such aspects or causes may be expected to have an impact on or nexus with India, and laws with respect to such aspects or causes would be beneficial to India.[72] Accordingly, Parliament may exercise its legislative powers with respect to extra-terrioritial aspects or causes provided they have consequences for (a) the territory of India, or any part of India; or (b) the interests of, welfare of, well-being of, or security of inhabitants of India, and Indians.[73] Thus, the court conceded the power of the Parliament to so legislate as aforesaid under clause (1) of article 245 and further ruled that such powers of legislation are not to be subjected to some a priori quantitative tests, such as "sufficiency" or "significance" or "predetermined degree of strength". All that would be required would be that that connection to India be real or expected to be real, and not illusory or fanciful.[74]

Court also discussed primordial condition for enacting extra-territorial laws

Parliament's power to enact laws, pursuant to clause (1) of article 245 may not extend to those extra-territorial aspects or causes that have no impact on or nexus with India. In other words, Parliament is not empowered to enact laws in respect of

68 *Id*. at 63.
69 *Id.* at 62.
70 *Id.* at 60.
71 1989 Suppl. (2) SCC 642.
72 *Supra* note 67 at 61.
73 *Id*. at 79.
74 *Ibid.*

extra-territorial aspects or causes that have no nexus with India. The court substantiated its conclusion with various reasons and responded to the various propositions of the attorney general. The same are discussed hereunder.

Absolute legislative sovereignty

The attorney general argued that Parliament is a "sovereign legislature" and that such a "sovereign legislature has full power to make extra-territorial laws". The court refused to concede the argument that Parliament, on account of an alleged absolute legislative sovereignty being vested in it, should be deemed to have the powers to enact any and all laws, the requirement that the purpose of such laws is for the benefit of India The arguments that India inherited the absolute or illimitable powers of British Parliament were unacceptable to the court and it recognized a well-accepted part of our constitutional jurisprudence that by virtue of having a written Constitution we have effectively severed our links with the Austinian notion that law as given by a sovereign is necessarily just. It is the Constitution that is supreme, with true sovereignty vesting in the people.[75]

Analysis of text

The court relied on textual analysis of article 245. In this regard the word "for" again provides the clue. To legislate for a territory implies being responsible for the welfare of the people inhabiting that territory, deriving the powers to legislate from the same people, and acting in a capacity of trustee. In that sense parliament belongs only to India; and its chief and sole responsibility is to act as Parliament of India and of no other country. The word "for" connects the territory of India to the legislative powers of Parliament in clause (1) of article 245, when viewed from the perspective of the people of India, implies that it is "our" Parliament, a jealously possessive construct that may not be tinkered with in any manner or form. The formation of the state, and its organs, implies the vesting of the powers of the people in trust; and that trust demands, and its continued existence is predicated upon the belief, that the institutions of the state shall always act completely, and only, on behalf of the people of India.[76]

International peace and security

The court also derived interpretational support for its conclusion from article 51. To enact legislation with respect to extra-territorial aspects or causes, without any nexus to India, would in many measure be an abdication of the responsibility that has been cast upon Parliament. International peace and security has been recognized as being vial for the interests of India. This is to be achieved by India maintaining just and honourable relations, by fostering respect for international and treaty obligations etc., as recognized in article 51. To claim the power to legislate for some other territories, even though aspects or causes arising, occurring or existing there have no connection, to India would be to demolish the very basis on which international peace and security can be premised.[77]

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75 *Id.* at 65-66.

76 *Supra* note 67 at 63-64.

77 *Id.* at 65.

Interpretative process: Constitutional topological space

The court's conclusion was also substantiated by one of the interpretative process viz. constitutional topological space. The court ruled that in interpreting the Constitution, the text of the provision under consideration is primary source for discerning the meanings that inhere in the enactment. However, in the light of the serious issues it would always be prudent, as a matter of constitutional necessity, to widen the search for the true meaning, purport and ambit of the provision under consideration. No provision, and indeed no word or expression, of the Constitution exists in isolation—they are necessarily related to, transforming and in turn being transformed by, other provisions, words and phrases in the Constitution. One method that may be adopted would be to view the Constitution as composed of constitutional topological spaces. Each part of the Constitution deals with certain core functions and purposes; though aspects outside such a core, which are contextually necessary to be included, also find place in such parts.[78] Accordingly, the court referred to some parts of the Constitution observing that "constitutional topological spaces, when primarily used for validation of unambiguous textual meanings, would ease court's epistemological burdens".[79]

a) *Part XI-Chapter-I*

On the basis of analysis of provisions in part XI, chapter-I of the Constitution, the court came to the conclusion that in this chapter there is no support for the propositions of the attorney general that Parliament may make laws "for" any territory other than the "whole or any part of the territory of India". It is a well-known dictum of statutory and constitutional interpretation that when the same words or phrases are used in different part of the Constitution, the same meaning should be ascribed, unless the context demands otherwise. In this case, there are no contextual reasons that would require reading a different meaning into the expression "for the whole or any part of the territory" in the context of articles 249, 250 or 253, than what the court has gathered from the text of article 245.[80]

b) *Part XI-Chapter-II*

Article 260 in the above noted chapter is the only provision in the Constitution that explicitly deals with the jurisdiction of the Union in relation to territories outside India, with respect to all three functions of governance – legislative, executive and judicial. Such a jurisdiction can be exercised only upon an agreement with foreign government (by comparing with international laws and principles. Therefore, it is implied that it is only "for" India that Parliament may make laws. Parliament still remains ours, and exclusively ours.[81]

c) *Part-I*

The court also derived support from the text of articles 1 and 2 in part-I of the Indian Constitution. Article 1, *inter alia*, provides that territories not a part of India

78 *Id.* at 58-59.
79 *Id.* at 60.
80 *Id*. at 69-70.
81 *Id.* at 69-71.

may be acquired. The mode of acquisition of such territory, and the specific time when such acquired territory becomes a part of the territory of India, are determined in accordance with international law.[82] It is only upon such acquired territory becoming a part of the territory of India would parliament have the power, under article 2, to admit such acquired territory in the Union or establish a new state. The crucial aspect is that it is only when the foreign territory becomes a part of the territory of India, by acquisition in terms of relevant international laws, Parliament is empowered to make laws for such a hitherto foreign territory. Consequently, the positive affirmation, in the phrase in clause (1) of article 245, that Parliament "may make laws for the whole or any part of the territory of India, has to be understood as meaning that unless a territory is a part of the territory of India, Parliament may not exercise its legislative powers in respect of such a territory. In the constitutional scheme it is clear that Parliament may not make laws for a territory, as a first order condition, unless that territory is a part of India.[83]

Moral voice

Moral voice was also invoked in aid of the conclusion. The court ruled that India's emergence as a free nation, through a non-violent struggle, presaged the emergence of a moral voice; that while we claim our right to self-determination, we claim it as a matter of our national genius, our status as human beings in the wider swath of humanity, with rights that are ascribable to us on account of our human dignity. Such a morality arguably does not brook the claims of absolute sovereignty to act in any manner or form, on the international stage or within the country. To make laws "for another territory is to denigrate the principle of self-determination with respect to those people, and a denigration of the dignity of all human beings, including our own.[84]

Present day constitutional jurisprudence

The attorney-general cited and relied on many decisions[85] in support of power of Parliament to enact extra-territorial legislation. The court found that none of the cases stands for the proposition that powers of Parliament are unfettered and that our Parliament possesses a capacity to make laws that have no connection whatsoever with India.[86] Further, court ruled that the statement made in *State* v. *Narayandas Mangilal Dayame*[87] that under our Constitution Parliament has been given absolute powers, and, therefore, it can enact extra-territorial laws, are not in comport with present day constitutional jurisprudence in India. Powers of every organ of the state are as provided for in the Constitution and not absolute.[88]

82 See, *Berubari Union and Exchange of Enclaves, In re*, AIR 1960 SC 845.
83 *Supra* note 67 at 72.
84 *Id*. at 76.
85 *Governor General in Council* v. *Raleigh Investment Co. Ltd.* (1944) 12 ITR 265 (FC); *Mortensen* v. *Peters* (1906) 8 F (Ct of Sess) 93 and *Croft* v. *Dunphy*, 1932 All ER 154 (PC).
86 *Supra* note 67 at 72.
87 AIR 1958 Bom. 68.
88 *Supra* note 67 at 74.

Source to extra-legislate and limitation to invalidate

On the basis of clause (2) of article 245 attorney general pleaded that clause (2) is an independent source of power for Parliament to legislate on extra territorial aspects. Further, in view of the said clause courts do not have the power to invalidate, i.e. strike down as *ultra vires* those laws enacted by Parliament that relate to any extra-territorial aspects or causes, notwithstanding the fact that many of such aspects or causes have no impact on or nexus with India.

The court ruled that if one were to read clause (2) of article 245 as an independent source of legislative power of Parliament to enact laws for territories beyond India wherein, neither the aspects or causes of such have a nexus with India, nor the purposes of such laws are for the benefit of India, it would immediately call into question as to why clause (1) of article 245 specifies that it is the territory of India or a part thereof "for" which Parliament may make laws. If the power to enact laws for any territory, including a foreign territory, were to be read into clause (2) of article 245, the phrase "for the whole or any part of the territory of India" in clause (1) of article 245 would become a mere surplusage. When something is specified in an article of the Constitution it is to be taken, as a matter of initial assessment, as nothing more was intended.[89] The aforesaid clause cannot be viewed as an independent source of legislative powers on account of the history of various iterations of the precursor to article 245 in the Constituent Assembly. The retention of the phrase "extra-territorial operation" as opposed to the phrase "extra-territorial-laws implies" that the drafters were actually aware of the difference between the meaning of the phrase "operation of law" and "making of law".[90]

The court ruled that it is important to draw a clear distinction between the acts and function of making laws and the acts and functions of operating the laws. The essential nature of the act of invalidating a law is different from both the act of making a law, and act of operating a law. Invalidation of laws falls exclusively within the functions of the judiciary, and occurs after examination of the vires of a particular law. While there may be some overlap of functions the essential cores of the functions delineated by the meaning of the phrase "make laws," "operation of laws" and "invalidate laws" are ordinarily and essentially associated with separate organs of the state – the legislature, the executive and the judiciary respectively, unless the context or specific text, in the Constitution unambiguously points to the some other association.[91] The power of the judiciary to invalidate laws that are ultra vires flows from its essential functions, constitutional structure, values and scheme, It is one of the essential defences of the people in a constitutional democracy.[92] However, clause (2) of article 245 acts as an exception, of a particular and a limited kind, to the inherent power of the judiciary to invalidate, if *ultra vires*, any of the laws made by any organ of the state. Generally, an exception can logically be read as only operating within the ambit of the clause to which it is an exception. It acts upon the main limb of the article—the more general clause—but

89 *Id.* at 68.
90 *Id*. at 69.
91 *Id*. at 66-67.
92 *Id.* at 66-68.

the more general clause in turn acts upon it. The relationship is mutually synergistic in engendering the meaning. In this case, clause (2) of article 245 carves out a specific exception that a law made by Parliament pursuant to clause (1) of article 245 for the whole or any part of the territory of India may not be invalidated on the ground that such a law may need to be operated extra-territorially. Nothing more. Consequently, the text of clause (2) of article 245 should be read to mean that it reduces the general and inherent powers of the judiciary to declare a law *ultra vires* only to the extent of that one ground of invalidation.[93]

Quintessence of this judgment is judicial imprimatur of constitutionalism *i.e.* no authority or institution created by the Constitution enjoys absolute power. Institutional and individual power is subject to limitation imposed by the Constitution. Accordingly, the court ruled "the very essence of constitutionalism is also that no organ of the state may arrogate to itself powers beyond what is specified in the Constitution".[94] Courts should always be very careful when vast powers are being claimed.[95] Powers and supremacy claimed must be locatable, either explicitly or implicitly, within the Constitution, and exercised within the four corners of constitutional permissibility, values and scheme.[96] The said judgment reiterates that power of Parliament is not unlimited but limited by constitutional principles. In 1993 the Supreme Court in *Sikkim Merger's* case[97] has ruled that power of Parliament to admit a new state into the Indian Union is limited by constitutional provisions incorporated in the Indian Constitution.

The topic of legislation provided in union list entry 20 is "pilgrimages to places outside India". Pursuant to this entry parliament enacted Haj Committee Act, 2002. In *Prafull Goradia* v. *Union of India*[98] the Parliament's competence to enact the said Act was upheld.

X PRECEDENT – ARTICLE 141

Foreign precedent

It is established principle of Indian law that a foreign precedent is not binding on our courts. It has only persuasive effect. In 1958 the Supreme Court held that

93 *Id.* at 67.

94 *Id*. at 58. *Cf.* Emmanuel Joseph Sieyes, What is the Third Estate? [London: Mall Press, 1963] (making a distinction between constituted and constituent power and stating the legal and political institutions created through the constituent power are identified as constituted powers. These bodies (e.g., the executive, legislative, and judicial powers) are always limited by the constitutional forms that grant their existence and cannot legitimately engage in acts of Constitution making). Referred by Joel Colon-Rios, "The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform" 48 *Osgoode Hall Law Journal* 199 (2010).

95 *Supra* note 67 at 77.

96 *Id.* at 74.

97 *R.C. Poudyal* v. *Union of India*, AIR 1993 SC 804; also see, *Ram Jethmalani* v. *Union of India* (2011) 8 SCC 1 (no treaty can be entered into, or interpreted, such that constitutional fealty is derogated from); *State of Himachal Pradesh* v. *Union of India* (2011) 13 SCC 344 (under article 3 Parliament cannot take away powers of state executive or state legislature in respect of matters enumerated in schedule VII list II).

98 (2011) 2 SCC 568.

use of a foreign precedent is legitimate.[99] However, it is important to note that courts in various countries are increasingly using foreign precedents and referring to foreign law.[100] Analysis of judicial decisions in many jurisdictions reveals a notable trend in use of foreign law. Courts not only rely on foreign precedents but also on juristic writing, religious literature, and comparative conditions. This trend is a consequence of judicial globalization[101] and its impact on the growth of comparative constitutional law. It has led to cross-constitutional fertilization and movement toward judicial dialogues amongst judges beyond their own legal system. However, the use of foreign law particularly constitutional law has become a matter of debate dividing the scholars and judges in two groups, i.e., proponents and opponents.[102] It is interesting to note the view of Peter J Messitte, Judge, United States District Court for the District of Maryland[103] wherein he uses a parable as a justification for use of foreign law which may appropriately be described as a 'Searchlight Theory of Comparative Constitutional Law'. His apocryphal story: "Some years ago, the aircraft carrier US Abraham Lincoln was cruising in the North Atlantic when it received a radio signal from the Canadians telling the Americans to divert their course 15 degrees south to avoid a collision". The Americans responded: "We suggest you divert your course 15 degrees north to avoid collision". The Canadians responded: "Repeat. Divert your course 15 degrees south". The Americans replied "We insist you divert". Another round of this and finally the Americans responded: "We are the USS Abraham Lincoln, the second largest aircraft carrier in the U.S. Navy. We are accompanied by two destroyers and three submarines. We insist you divert your course or we will be required to take appropriate action". To which the Canadians replied: "Your call: We are a lighthouse".[104] The concluding version of Peter J. Messitte is very important from the point of view of use of foreign law or precedent. He writes "if reason prevails, we can look forward to the day that most, if not all, of our fellow citizens understand that when our Supreme Court (USA) occasionally cites foreign law sources - that in fact it's a lighthouse there - it's not a menacing vessel that's trying to interfere with our progress. Such a lighthouse - containing all that foreign law - only exists to help illuminate us along our way".[105] The aforesaid view is reflected in the decision of *Aruna Ramchandra Shanbaug* v.

99 See, *Express Newspaper* v. *Union of India,* AIR 1958 SC 578.

100 See, Robert Reed, "Foreign Precedents and Judicial Reasoning" the American Debate and British Practice" 124 *LQR* 253 (2008).

101 See, Ann Marie Slaughter, 'Judicial Globalization' 40 *Va J Int'L Law* 1103 (2003); 'A Global Community of Courts' 44 *Va J Int'L Law* 191 (2003).

102 See, debate between Justice Scalia and Breyer: A Conversation between U.S. Supreme Court Justices 2005 (3) *Int'l J Const Law* 519; The reason for revisiting this debate in Indian context is Sodomy decision of Delhi High Court in *Naz Foundation* v. *Government of NCT Delhi*, 160 *DLT* 277 (2009). For an excellent discussion on this case see, *Madhv* v. *Khosla*, 'Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision' 59 *American Journal of Comparative Law* 909 (2011).

103 See, 'Citing Foreign Law in U.S. Courts Is Our Sovereignty Really at Stake?' 35 *Baltimore L Rev* 171 (2005).

104 Peter J. Messitte at 171.

105 *Id*. at 183.

Union of India[106] wherein the court was considering the legality of euthanasia. In this case a writ petition was filed seeking permission to withdraw medical treatment of a woman who was in Permanent Vegetative State for 37 years. The opening part of the judgment observes: "Euthanasia is one of the most perplexing issues which the courts and legislatures all over the world are facing today. This court, in this case, is facing the same issue, and we feel like a ship in an uncharted sea, seeking some guidance by the light thrown by the legislations and judicial pronouncements of foreign countries, as well as the submissions of the learned counsel before us".[107] It must be appreciated that the first part of the observation is very close to the analogy drawn by Peter J. Messitte.[108] The second part of the observation recognizes the importance of use of foreign law. Analysis of the said decision highlights that while the Indian Supreme Court reiterated the settled principle that foreign decisions are not binding and are of only persuasive value but in fact travelled beyond the zone of persuasion. It adjudicated the issue in the light of foreign law on the point. The Indian Supreme Court has referred to foreign law from the beginning.[109]

Firstly; in *Shanbaug* case[110] a committee of doctors appointed by the court submitted a report about the condition of the woman including a CD. The court arranged for the screening of the CD in the courtroom, so that all present in the court could see the condition of Aruna Shanbaug. For doing so, the court relied on the precedent of the Nuremburg trials in which a screening was done in the courtroom of some of the Nazi atrocities during the second world war.[111]

Secondly, considering the legality of euthanasia the court distinguished between active euthanasia and passive euthanasia and referred to legislation in Netherlands, Switzerland, Belgium UK, Spain, Austria, Italy, Germany, France, United States of America and Canada. It observed that 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.[112]

Thirdly, the court noted that there is a plethora of cases all over the world relating to both active and passive euthanasia. It referred in detail to certain landmark decisions, which have laid down the law on the subject,[113] e.g., the decision of the Supreme Court of Canada in *Rodriguez* v. *British Columbia (Attorney General)*.[114] In particular, it referred to a decision of the House of Lords in *Airedale NHS Trust*

106 (2011) 4 SCC 454.
107 *Id.* at 466.
108 *Supra* note 103.
109 For an excellent examination of the Supreme Court of India's use of Foreign law from 1950 to 2005 and reasons, therefore, see, Adam M. Smith, 'Making Itself at Home - Understanding Foreign Law in Domestic Jurisprudence: the Indian Case' 24 *Berkley J Int'l L* 218 (2006).
110 *Supra* note 106.
111 *Id.* at 476.
112 *Id*. at 491.
113 *Id.* at 497-511.
114 (1993) 3 SCR 519 (Can).

v. *Bland*[115] and concluded that the law is now fairly well settled that in the case of incompetent patients, if the doctors act on the basis of informed medical opinion, and withdraw the artificial life support system if it is in the patient's best interest, the said act cannot be regarded as a crime.[116] The court also referred to American decisions[117] and ruled: (1) that foreign decisions have only persuasive value in our country, and are not binding authorities on our courts. Hence, we can even prefer to follow the minority view, rather than the majority views of the foreign decision, or follow an overruled decision; (2) *Airedale* case[118] is more apposite as a precedent for us.[119]

Again, the law propounded in *Airedale* case[120] by Lord Keith came as a searchlight on the point that in such cases approval of the high court should be taken. The court ruled that 'if it is left solely to the patient's relatives or to the doctors or next friend to decide wither to withdraw the life support of an incompetent person there is always a risk in our country that this may be misused by some unscrupulous person who wish to inherit or otherwise grab the property of the patient. Considering the low ethical levels prevailing in our society today and the rampant commercialization and corruption, one cannot rule out the possibility that unscrupulous persons with the help of some unscrupulous doctors may fabricate material to show that it is a terminal case with no chance of recovery. There are doctors and doctors. The commercialization of our society has crossed all limits. While giving great weight to the wishes of the parents, spouse, or other close relatives or next friend of the incompetent person and also giving due weight to the opinion of the attending doctors, one cannot leave it entirely to their discretion whether to discontinue the life support or not. The approval of the high court should be taken in this connection.[121]

XI REPUGNANCY BETWEEN CENTRAL AND STATE LAW – ARTICLE 254

In cases pertaining to repugnancy between a state law and a central law the Supreme Court has reiterated the settled law. Doctrine of incidental encroachment was applied in most of the cases. In *K.T. Plantation* v. *State of Karnataka*[122] the court rejected the contention that the Devikarani Roerich Estate (Acquisition and Transfer) Act, 1996 enacted by Karnataka legislature was repugnant to Central Act

115 (1993) 1 All ER 821.

116 *Supra* note 106 at 507.

117 *Washington* v. *Glucksberg,* 138 L Ed 2d 727: 521 US 702 (1996); *Vacco* v. *Quill,* 138 L Ed 2d 834: 521 US 793 (1996); *Cruzan* v. *Missouri Deptt of Health (MDH),* 111 L Ed 2d 224: 497 US 261 (1989); *Schloendorff* v. *Society of New York Hospital,* 211 NY 125: 105 NE 92 (1914); *Quinlan In re,* 70 NJ 10: 355 A 2d 647 (1976) and *Connroy, In re,* 98 NJ 321: 486 A 2d 1209 (1985).

118 *Supra* note 115.

119 *Supra* note 106 at 512.

120 *Supra* note 115.

121 *Supra* note 106 at 519-520; also see, *P.D. Dinakaran* v. *Judges Inquiry Committee, Supra* note 50.

122 (2011) 9 SCC 1.

viz. Land Acquisition Act, 1894. The plea was that the state Act was void under article 254(1) due to want of the Presidential assent on repugnancy. The court reiterated the settled principle that the question of repugnancy under article 254 of the Constitution arises when the provisions of both laws are fully inconsistent or are absolutely irreconcilable and it is impossible without disturbing the other, or conflicting results are produced, when both the statutes covering the same field are applied to a given set of facts. Repugnancy between the two statutes would arise if there is a direct conflict between the two provisions and the law made by Parliament and the law made by the state legislature occupy the same field. It has to be examined whether the two legislations cover or relate to the same subject matter. The test for determining the same is to find out the dominant intention of the two legislations. If the dominant intention of the two legislations is different and they cover different subject-matter then merely because the two legislations refer to some allied or cognate subjects, they do not cover the same field. A provision in one legislation to give effect to its dominant purpose may incidentally be on the same subject as covered by the provisions of the other legislation, but such partial coverage of the same area in a different context and to achieve a different purpose does not bring about repugnancy which is intended to be covered by article 254(2). In this case the court ruled that the state Act falls under list II entry 18, because the dominant intention of the legislature was to preserve and protect Roerichs Estate covered by the provisions of the land reforms act. The Acquisition Act, though primarily falls under list II entry 18 yet incidentally deals with the acquisition of paintings, artefacts and other valuable belongings of the Roerichs. Hence, the Act partly falls under list III entry 42 as well. Since the dominant purpose of the Act was to preserve and protect Roerichs Estate as part of agrarian reforms, the inclusion of ancillary measures would not throw the law out of the protection of article 31-A(1)(a). On the other hand, the Land Acquisition Act, 1894 is an Act which falls exclusively under list III entry 42 and is substantially and materially different from the impugned Act whose dominant purpose is to preserve and protect "estate" governed by article 31-A (1)(a) read with article 31(2)(a)(iii) of the Constitution. Therefore, no assent of the President was required under article 254(2) of the Constitution to sustain, the impugned Act.[123]

The repugnancy between state law *viz.* Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960 and central law, viz., Forest Act, 1927 was also considered in *Rajiv Sarin* v. *State of Uttarakhand*.[124] The plea was that section 18(1) (cc) read with section 19(1) (b) of the 1960 State Act (as amended by the U.P. Amendment Act, 1978) are repugnant to section 37 and section 84 of the 1927 Act of the central legislature. The basis of contention was that no compensation is provided for under the U.P. Amendment Act, 1978 for private forests which are preserved and protected through prudent management, while a private forest which is neglected or mismanaged to which section 30 of Act of 1927 applies, can be acquired under the Land Acquisition Act, 1894 by paying market value and solatium. The court ruled that no case of repugnancy was made out and consequently, both

123 *Id*. at 38-40.
124 (2011) 8 SCC 708.

the Acts are legally valid. The state law is principally relatable to schedule VII list II entry 18 (Land) read with list III entry 42 of the Constitution and only incidentally trenches upon "forests", i.e., schedule VII list III entry 17-A of the Constitution. This is so because it is an enactment for agrarian reforms and so the basic subject matter is "land". Since the land happens to be forest land, it spills over and incidentally encroaches on entry 17-A *i.e*. "forests" as well. On the other hand, the Central Act *i.e*. the Forest Act, 1927 is relatable to entry 17-A read with entry 42, both of list III of schedule VII to the Constitution. It is, in pith and substance, relatable to entry 17-A, as it deals with "forests" and not with "land" or any other subject. It only incidentally spills over in the field of entry 42, as it deals with "control over forest land and not property of the government" and in that context section 37, as an alternative to management of forests under section 36 of the Forest Act, 1927, deals with the grant of power to acquire land under the Land Acquisition Act, 1894.[125] While considering the issue of repugnancy what is required to be considered is the legislation in question as a whole and its main object and purpose. While doing so incidental encroachment is to be ignored and disregarded.[126] The State Act of 1960 deals with agrarian reforms and in the context deals with the private forests. This vest with the state and would, therefore, be managed by the *gaon Sabha*. The Forest Act, 1927 which is the existing central law, has nothing to do with agrarian reforms but deals with forest policy and management, and, therefore, is in a different field. Further, there is no direct conflict or collision, as the Forest Act, 1927 only gives an enabling power to the government to acquire forests in accordance with the provisions of the Land Acquisition Act, 1894, whereas the state act results in vesting of forest from the dates specified in section 4-A of the Act. Consequently, it could be deduced that none of the three conditions laid down in the "triple test" by a constitution bench[127] is attracted to the facts of the present case.[128]

In *Girnar Traders* v. *State of Maharashtra*[129]court considered whether provisions of Maharashtra Regional and Town Planning Act, 1966 were in conflict with the central law *viz.* Land Acquisition Act, 1894. It was held that the two statutes operate in different fields the provisions of which are required to be utilized by the authorities concerned for the object sought to be achieved under the respective Acts.[130] The MRTP Act, 1966 was held to be a self-contained code[131] and the same

125 *Id.* at 722.

126 *Id.* at 723.

127 See, *M. Karunanidhi* v. *Union of India* (1979) 3 SCC 431. (Laying down three conditions viz., (1) that there is a clear and direct inconsistency between the Central Act and the State Act; (2) that such an inconsistency is absolutely irreconcilable; and (3) that the inconsistency between the provisions of the two acts is of such a nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other.)

128 *Supra* note 124 at 724.

129 (2011) 3 SCC 1.

130 *Id.* at 48.

131 The court discussed the rest to determine when an Act can be held as a self-contained code and also noted distinction between doctrine of Incorporation and doctrine of reference.

would not lose its colour or content merely because it makes reference to some of the provisions of the Land Acquisition Act, 1894. The court reiterated the application of doctrine of incidental encroachment. An incidental cause cannot override the primary cause. Even if fractional overlapping is accepted between the two statutes then it will be saved by the doctrine of incidental encroachment.[132]

In *Banatwala* v. *Life Insurance Corpoation*[133] the court considered the question whether provisions of the Maharashtra Rent Control Act, 1999 with respect to the fixing of the standard rent as well as restoring the essential supplies and services are in any way repugnant to the public premises (Eviction of Unauthorized Occupants) Act, 1971? It ruled that both these subjects are covered under the MRC Act but in no way under the public premises act. Accordingly, there was no conflict between the two statutes.

XII RIGHT TO PROPERTY – ARTICLE 300-A

By Constitution (Forty-fourth Amendment) Act, 1978 articles 19 (1) (f) and 31 were deleted from the Constitution and a new chapter; i.e., chapter IV entitled "Right to property" was inserted incorporating a new article, viz., 300-A. It provides that 'no person shall be deprived of property save by authority of law'. The scope and extent of this article was considered in some cases particularly the question whether having regard to the express language of article 300-A the common law limitations of eminent domain can be read into that article especially when, the right to property is no more a fundamental right?

Eminent domain

In this regard it is interesting to note the response of the court in *Rajiv Saran* v. *State of Uttarakhand*[134] wherein the court observed that 'article 31(2) of the Constitution has since been repealed by the Constitution (Forty-fourth Amendment) Act, 1978. Article 300-A was inserted by the Constitution (Forty-fourth Amendment) Act, 1978 by practically re-inserting article 31(1) of the Constitution'. Therefore, right to property is no longer a fundamental right but a right envisaged and conferred by the Constitution and that also by retaining only article 31(1) of the Constitution and specially deleting article 31(2), as it stood. In view of the aforesaid position the entire concept of right to property has to be viewed with a different mindset than the mindset which was prevalent during the period when the concept of eminent domain was the embodied provision of fundamental rights.[135] The judicial mindset can be explored by analyzing the cases on point decided by the apex court.

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132 *Supra* note 129. Also see, *K.K. Baskaran* v. *State*, 2011 (3) SCC 793 (recognizing doctrine of incidental encroachment) and *Offshore Holdings* v. *Bangalore Development Authority* (2011) 3 SCC 137 (referring to distinction between 'ancilariness' and 'incidentally affecting. Also stating that doctrine of severability is applicable in case of repugnancy).

133 (2011) 13 SCC 446.

134 *Supra* note 124.

135 *Id*. at 734.

State of Karnataka enacted Roerich and Devikarani Roerich Estate (Acquisition and Transfer) Act, 1996. Its dominant purpose is to preserve the land used for linealo cultivation as part of agrarian reform. Ancillary purpose is preservation of certain valuables belonging to landowners. The constitutionality of the Act was challenged on the ground that it is violative of article 300-A because the impugned Act does not provide for any principle or guidelines for the fixation of the compensation amount. Further the amount fixed is illusory, compared to the value of the property taken away in exercise of the powers of eminent domain. A plea was raised that the concept of eminent domain and its key components, viz., (i) public purpose; and (ii) compensation should be read into article 300-A. The court recognized that though the principles of eminent domain, as such, are not incorporated in article 300-A, as one see, in article 30(1-A), as well as in second proviso to article 31-A (1), yet court can infer those principles in article 300-A.[136] The court explained the origin and essence of the doctrine of eminent domain; and distinguished from police power and taxation power.

The court ruled that the concept of public purpose has been given fairly expansive meaning which has to be justified upon the purpose and object of the statute and the policy of the legislation. Public purpose is, therefore, a condition precedent, for invoking article 300-A. It is invariably the rule for depriving a person of his property, violation of which is amenable to judicial review.[137]

As regards right to claim compensation the court ruled that it cannot be traced under list III entry 42. There is no apparent conflict with the words used in list III entry 42 so as to infer that the payment of compensation is inbuilt or inherent either in the words "acquisition and requisitioning" under the said entry. Right to claim compensation, therefore, cannot be read into the said legislative entry.[138] However, it ruled that the right to claim compensation is also inbuilt in article 300-A.[139] The right to claim compensation or the obligation to pay, though not expressly included in article 300-A, can be inferred in the said article and it is for the state to justify its stand on justifiable grounds which may depend upon the legislative policy, object and purpose of the statute and host of other factors.[140] Article 300-A enables the state to put restrictions on the right to property by law. That law has to be reasonable. It must comply with other provision of the Constitution. The limitation or restriction should not be arbitrary or excessive or what is beyond required public interest. The limitation or restriction must not be disproportionate to the situation or excessive. Thus in each case courts will have to examine the scheme of the impugned Act, its object, purpose also the question whether payment of nil compensation or nominal compensation would make the impugned law unjust, unfair or unreasonable in terms

136 *Supra* note 122 at 53.

137 *Id*. at 53-54. Also see, *Royal Orchid Hotels* v. *G Jayarama Reddy* (2011) 10 SCC 608 (holding fraudulent diversification of purpose for which land is acquired is not permissible).

138 *Supra* note 122 at 55.

139 *Id.* at 62.

140 *Id.* at 55.

of other provisions of the Constitution.[141] The court substantiated its conclusion with rule of law. As a concept it finds no place in our Constitution. However, it has been characterized as a basic feature of our Constitution and cannot be abrogated or destroyed even by Parliament and in fact binds Parliament. Accordingly, the court observed that one of the fundamental principles of a democratic society inherent in all the provisions of the Constitution is that any interference with the peaceful enjoyment of possession should be lawful. Therefore, it gave a loud and clear message that the rule of law exists in this country even when court interpret a statute, which has the blessings of article 300-A.[142]

Court also ruled that no compensation or nil compensation or its illusiveness has to be justified by the state on judicially justiciable standards. Measures designed to achieve greater social justice, may call for lesser compensation and such a limitation by itself will not make legislation invalid or unconstitutional or confiscatory.[143] It clarified that there is a difference between "no" compensation and "nil" compensation. A law seeking to acquire private property for public purpose cannot say that "no compensation shall be paid". However, there could be a law awarding "nil" compensation in cases where the state undertakes to discharge the liabilities charged on the property under acquisition and onus is on the government to establish validity of such law. In the later case, the court in exercise of judicial review will test such a law.[144]

The key elements of doctrine of eminent domain, viz., public purpose and compensation in relation to article 300-A were also considered in *Rajiv Saran* v. *State of Uttarakhand*[145] State of U.P. enacted Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960 which was amended by U.P. Act 15 of 1978. It was contended that the said Act does not provide for any principle or guidelines for the fixation of the compensation amount in a situation when no actual income is being derived from the property in question. The court reiterated that in the last sixty years, though the concept of public purpose has been given quite wide interpretation. It remains the most important condition in order to invoke article 300-A of the Constitution.[146] With regard to compensation court took notice of the fact that all modern Constitutions which are invariably of democratic character provide for payment of compensation as the condition to exercise the right of expropriation.[147] It also distinguished between the concept of "no compensation" and the concept of "nil compensation" and held that a law seeking to acquire private property for public purpose cannot say that "no compensation" would be paid. The court ruled that the instant case is a case of payment of "no compensation" at all. In the case at hand, the forest land which was vested in the state by operation of law cannot be said to be non-productive or unproductive by any stretch of imagination.

141 *Ibid*.
142 *Id*. at 62.
143 *Id*. at 55.
144 *Id.* at 55-56.
145 *Supra* note 124.
146 *Id.* at 732.
147 *Ibid*.

The court found sufficient force in the argument of the counsel for the appellants that awarding no compensation attracts the vice of illegal deprivation of property even in the light of the provisions of the Act and is, therefore, amenable to writ jurisdiction. Upholding the validity of the Act the court directed the collector to determine and award compensation to the appellants by following a reasonable and intelligible criterion evolved and in the light of the law enunciated by the court.[148]

Rehabilitation and resettlement of displaced person

One of the questions considered by court is whether persons displaced as a result of land acquisition are entitled to rehabilitation and resettlement? In *State of Madhya Pradesh* v. *Narmada Bachao Andolan*[149] the court considered the entitlement of oustees of land acquired for Omkareshwar Dam in Madhya Pradesh. It ruled that compensation in the present context has to be understood in relation to the right to property. The right of the oustee is protected only to a limited extent as enunciated in article 300-A. Compensation is awarded by the authority of law under article 300-A of the Constitution read with the relevant statutory law of compensation, for the area acquired. Rehabilitation on the other hand, is restoration of the status of something lost, displaced or even otherwise a grant to secure a dignified mode of life to a person who had nothing to sustain himself. This concept, as against compensation and property under article 300-A, brings within its fold the presence of the elements of article 21 of Constitution.[150] State cannot be compelled to provide alternative accommodation to affected persons. It is for the authority concerned to consider feasibility of providing alternative land. State has a right to frame a policy in this regard taking into account the extent of its resources and other priorities.

In exercise of its power of eminent domain, the state can compulsorily acquire land of private persons. However, state cannot exercise its power in such a manner so as to defeat the constitutional right to property enshrined in article 300-A. Two notable cases in this regard were decided by Supreme Court this year.

"Seisin from ancestry" - adverse possession

The right to property is not only a constitutional or statutory right but also a human right. Now human rights are gaining a multifaceted dimension. Right to property is also considered very much a part of the new dimension. Therefore, even the claim of adverse possession has to be read in that context. This view was propounded in *State of Haryana* v. *Mukesh Kumar*[151] wherein the court considered the question whether a welfare state, which is in charge of protection of life, liberty and property of the people can be permitted to grab the land and property under the

148 *Id.* at 736.

149 (2011) 7 SCC 639. Also see, *Ramji Veerji Patel* v. *Revenue Divisional Officer* (2011) 10 SCC 643 (emphasizing the need to replace the outdated Land Acquisition Act, 1894 by a fair reasonable and rational enactment in tune with article 300-A and observing that the Act do not adequately protect the interest of landowners, nor provide for rehabilitation of persons displaced).

150 *Id.* at 686.

151 (2011) 10 SCC 404.

banner of the plea of adverse possession? In question was the claim of the state of Haryana, through the superintendence of police, to title of certain private land by way of adverse possession. If the court described it as "a testament to the absurdity of the law and a black mark upon the justice system's legitimacy".[152] Court traced the historical background of the concept of adverse possession *i.e.* it was born in England around 1275 and was initially created to allow a person to claim the right of "seisin" from the ancestry. The concept of adverse possession was subsequently adopted in United States, subsequently negative view of the doctrine was taken by English law particularly in the light of the view that property is a human right adopted by the European commission.[153] Court observed that the doctrine of adverse possession has troubled a great many legal minds and opined that time has come for change. It directed 'no government department, public undertaking, and much less the police department should be permitted to perfect the title of the land or building by invoking the provisions of adverse possession and grab the property of its own citizens in the manner that has been done in this case.[154] Court recommended the Union of India to immediately consider and seriously deliberate either abolition of the law of adverse possession and in the alternate to make suitable amendments in the law of adverse possession:[155] (1) the law must require those who adversely possess land to compensate the title owners according to the prevalent market rate of the land or property in question; parliament may either fix a set range of rates or leave it to the judiciary with the option of choosing from within a set range of rates so as to tailor the compensation to the equities of a given case; (2) require the adverse possession claimants to possess the property in question for a period of 30 to 50 years, rather than a mere 12.[156]

Transfer to private parties – purpose diversification

The power to acquire private land for public purpose cannot be overstretched to legitimize a patently illegal and fraudulent exercise undertaken for depriving the landowners of their constitutional right to property with a view to favour private persons. In *Royal Orchid Hotels* v. *G. Jayarama Reddy*[157] the land was acquired at the instance of Karnataka State Tourism Development Corporation for the specified purpose, i.e., golf-cum-hotel resort near Bangalore Airport. Subsequently, a major portion of the acquired land was transferred to a private individual and corporate entity by citing poor financial health of the corporation as the cause for doing so. The diversification of public purpose was held illegal and contrary to the spirit of article 300-A.

152 *Id.* at 418. Also see, *Food Corporation of India* v. *Dayal Singh*, 1991 PLJ 425 (ruling that it does not behove the Government to take the plea of adverse possession against the citizens).
153 *Supra* note 151 at 412-14.
154 *Id*. at 419-20.
155 *Id*. at 420.
156 *Id*. 418-19.
157 *Supra* note 137.

XIII SUBORDINATE JUDGE – REMOVAL WITHOUT ENQUIRY – APPLICATION OF ARTICLE 311 (2)(c)

Under clauses (a) to (c) of second proviso to article 311 of the Constitution the disciplinary authority can impose penalty on a civil servant without conducting enquiry. The Supreme Court has ruled that the said provision can also be invoked while removing a subordinate judge. In *Ajit Kumar* v. *State of Uttaranchal Pradesh*[158] full bench Uttarakhand High Courts recommended for invocation of clause (b) of 2nd proviso to article 311 (2) to dispense with inquiry against a subordinate judge, who used to get his judgments prepared by somebody else. Following this the Governor passed removal order. The apex court ruled that a subordinate judge is also a judge within meaning of article 233 read with articles 235 and 236. Under article 233 appointments and promotions of district judges in any state are to be made by the Governor in consultation with the high court. If a person is found not worthy to be a member of judicial service or it is found that he has committed a misconduct he could be removed from service by following the procedure laid down. For such dismissal and removal power under article 311 (2)(b) can be invoked by following the conditions prescribed. The high court has power to dispense with an enquiry for reasons to be recorded in writing. Such dispensation of an enquiry can be made for valid reasons. The Governor may pass orders in terms of recommendation of the high court.

XIV SUIT BETWEEN CENTRE AND STATE – ARTICLE 131

An original suit filed in 1996 by State of Himachal Pradesh under article 131 of the Constitution was decided by the apex court this year. In this suit state of Himachal Pradesh impleaded Union of India, states of Punjab, Haryana, Rajasthan and Union Territory of Chandigarh as respondents claiming, *inter alia*, its share of power from the Bhakra Nangal and Beas projects. The *raja* of Bilaspur state now part of Himachal Pradesh executed agreement with the Dominion of India before the commencement of the Constitution. On scrutiny of record court came to the conclusion that there was no final agreement between the parties as to allocations of power. Whatever allocations were made they were only of interim nature. Some issues concerning scope and extent of article 131 were considered in *State of Himachal Pradesh* v. *Union of India*.[159]

Firstly; court rejected the respondents' plea of limitation on the ground that article 131 does not prescribe any limitation period. The suit was not barred by limitation because only a provisional arrangement had been made regarding rights of parties under section 66 of Punjab Reorganization Act, 1966.

Secondly; the plea raised by the State of Rajasthan was that the suit is actually a dispute with regard to use of inter-state rivers water, namely, Sutlej and Beas. Therefore, it was barred under article 262 (2) of the Constitution. The plea was rejected. On the basis of assertions made in the entire plaint as well as the reliefs claimed therein by the plaintiff the court came to the conclusion that the dispute

158 *Supra* note 3.
159 (2011) 13 SCC 344.

does not relate to a dispute in relation of inter-state river water or the use, thereof. Actually it relates to sharing of power generated in the Bhakra-Nangal and the Beas projects and such a dispute was not barred under clause (2) of article 262 of the Constitution read with section 11 of the Inter-State Water Disputes Act, 1956.[160]

States of Haryana and Rajasthan also raised a plea that the suit was barred under proviso to article 131 read with article 363 of the Constitution. Under article 131 of the Constitution there is a clear bar to decide a dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument which, having been entered into or executed before the commencement of Constitution, continues in operation after such commencement. Further, under clause (1) of article 363 (1) claims based on such pre-constitutional agreements by erstwhile rulers are not maintainable. Accordingly, the court ruled that it had no jurisdiction to decide any dispute arising out of any agreement or covenant between the raja of Bilaspur and the government of the dominion of India. However, the court ruled that the claim of the plaintiff state was also based on the Punjab Reorganization Act, 1966 and the provisions of the Constitution and such claim was not barred under article 363 of the Constitution.[161] Section 78 (1) of the Punjab Reorganization Act, 1966 provides that the rights and liabilities of the successor states of the composite State of Punjab will be fixed according to an agreement between the successor states. In the instant case there was no such final agreement between the successor states with regard to the share of power generated and there was only an interim arrangement. Therefore, the plaintiff had a legal right as a successor state of the composite State of Punjab to receive and utilize the power generated in the Bhakra-Nangal and Beas projects and this right was recognized by law and capable of being enforcement by the power of the state. The suit of the plaintiff was nor barred by the scheme of sections 78 to 80 of the Punjab Re-organization Act, 1966.

XV TRIBUNALS – ARTICLE 323-A AND 323-B

Judicial power to create tribunals

Part XIV-A of the Constitution deals with tribunals. Articles 323-A and 323-B provide for establishment of tribunals. The Supreme Court has ruled in *State* of *Karnataka* v. *Vishwabharthi House Building Cooperative Society*[162] that these two articles enable the legislature to set up tribunals. They are not to be interpreted as prohibiting the legislature from establishing tribunals not covered by the said articles as long as there is legislative competence under an appropriate entry in the seventh schedule. In *Secretary A.P.D* v. *Shivaji Bhagwat More*[163] the apex court considered the question whether the high court can direct the state government to create a tribunal, and whether creation of such a tribunal by an executive order, by the state government, in pursuance of such a direction, was valid? State of Maharashtra by a government resolution accorded sanction for implementation of shikshan sevak

160 *Id.* at 363.
161 *Id.* at 362.
162 (2003) 2 SCC 412.
163 (2011) 13 SCC 99.

scheme in all recognized private secondary schools and junior colleges in the state. Under this scheme the state government originally conceived it as an administrative grievance redressal mechanism. The high court by judicial order converted it into a one man tribunal consisting of a retired judge.

The Supreme Court ruled that apart from constitutional provisions, tribunals with adjudicatory powers can be created only by statutes. Their powers are derived from the statute that created them and they have to function within the limits imposed by such statute. It is possible to achieve the independence associated with a judicial authority only if it is created in terms of the Constitution or a law made by the legislature.[164] Neither the Constitution nor any statute empowers a high court to create or constitute quasi-judicial tribunals for adjudicating disputes. It has no legislative powers. Nor can it direct the executive branch of the state government to create or constitute quasi-judicial tribunals, otherwise than by legislative statutes. Therefore, it is not permissible for the high court to direct the state government to constitute judicial authorities or tribunals by executive orders, nor permissible for the state by executive order or resolution to create them for adjudication of rights of parties.[165] On the other hand the powers of the state to exercise executive powers on par with the legislative powers of the legislature, is "subject to the provisions of this Constitution". The provisions of the Constitution, namely articles 233, 234 and 247 for constituting subordinate courts, and articles 323-A and 323-B for constituting tribunals by law made by legislature, make it clear that judicial tribunals shall be created only by statutes or rules framed under authority granted by the Constitution.[166]

XVI CONCLUSION

The year under survey witnessed by and large application and reiteration of established principles of constitutional law. However, some of the notable points in constitutional adjudication are worth taking note of. Impeccable functioning is expected from constitutional functionaries holding high public offices. A feeling must be generated amongst the citizenry that their functioning is imbued in constitutional ethos; is guided by the spirit of law of the land and is dominated by nothing but only the public interest. The object of para 5 of the tenth schedule to the Constitution is defeated if a speaker of the legislative assembly adopts a partisan attitude while passing an order of disqualification against members of the house. The power of the people vested in any organ of the state and its agencies can only be used for promotion of constitutional values. Governmental action evolved out of the darkness that has begun to envelope our policy makers, with increasing blindness to constitutional wisdom has not only invited deprecation but also judicial interference. It signifies that as constitutional adjudicator Supreme Court has always to be mindful of its duty to preserve the sanctity of constitutional values. No organ created by the Constitution including parliament enjoys unlimited powers.

164 *Id*. at 109.
165 *Id*. at 110.
166 *Ibid.*

Parliaments' power to enact extra-territorial legislation is subject to constitutional limitation. Supremacy claimed must be locatable either explicitly or implicitly, within the Constitution. In view of the written Constitution any claim of inheritance of absolutely or illimitable powers of the British Parliament are not maintainable. Moral voice too does not brook the claims of absolute sovereignty to act in any manner or form, on the international stage or within the country. Even the judicial power is subject to constitutional constraints. It has no powers to direct creation of *quasi*-judicial tribunals. Doctrine of eminent domain should be read in the constitutional right to property. Right to property is not a fundamental right. However it is not only a constitutional right but also a human right. The archaic doctrine of adverse possession is not in tune with the said right. Accordingly, the legislature may consider its abolition or modification with suitable amendments.