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CONSTITUTIONAL LAW – I

(FUNDAMENTAL RIGHTS)

*S N Singh**

I INTRODUCTION

ONE OF the most controversial issues relating to fundamental rights that came up for adjudication before the Supreme Court in the year 2012 was the constitutional validity of distribution of state largesse under article 14 of the Constitution of India. The year started with a strong hammer used by the Supreme Court in deciding the validity of 2G spectrum allocation[1] and the year virtually ended with advice to the President of India under article 143 of the Constitution giving a sigh of relief to the central government holding that the mode of allocation of natural resources and other state properties was a matter of policy, to be decided by the executive, and not by the court, and that the 'public auction' was not the only method of allocation of public properties such as natural resources.[2] The issue of reservation, be it admissions in educational institutions or appointments to public services, has always been one of the most controversial and contentious issues before the courts. During the current year also, the decisions on the issue raised a great hue and cry both from the supporters as well as the opponents of reservations.[3] A few other controversial and notable cases decided by the apex court involving fundamental rights related to the persons who could be appointed information commissioners under the Right to Information Act, 2005,[4] inter-linking of rivers,[5] and right to sleep as a fundamental right under article 21.[6] Some of the public interest cases relating to fundamental rights started in the previous years or started during the current year continued to

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* LL.M., Ph.D., Advocate, Supreme Court of India. Comments and suggestions on this survey may be sent at: s_nsingh@hotmail.com.

1 *Centre for Public Interest Litigation* v. *Union of India*, AIR 2012 SC 3725, 1002; *Subramanian Swamy* v. *Manmohan Singh*, AIR 2012 SC 1185.

2 *Natural Resources Allocation*, *In re Special Reference No. 1 of 2012*, JT 2012 (9) SC 457 : 2012 (9) SCALE 310 : (2012) 10 SCC 1.

3 *U.P. Power Corpn. Ltd.* v. *Rajesh Kumar*, AIR 2012 SC 2728 : (2012) 7 SCC 1 : JT 2012 (4) SC 459; also see *General Categories Welfare Federation* v. *Union of India* (2012) 7 SCC 40.

4 *Namit Sharma* v. *Union of India,* 2012 (8) SCALE 593 : AIR 2012 SC (Supp) 867.

5 *In re Networking of Rivers* (2012) 4 SCC 51 : 2012 (3) SCALE 74 : JT 2012 (3) SC 234.

6 *In re Ramlila Maidan Incident Dt. 4/5.6.2011* v. *Home Secretary, UOI*, JT 2012 (3) SC 1 : AIR 2012 SC (Supp) 266.

be monitored by the apex by issuing directions throughout the year. They relate to right to education;[7] right to food, shelter and basic amenities;[8] amenities to *Amarnath* pilgrims,[9] protection of historical monuments of national and international importance,[10] sex workers rehabilitation;[11] manual scavenging;[12] right to health;[13] regulation/prohibition of endosulfin manufacture;[14] effective implementation of the provisions of the Mahatma Gandhi National Rural Employment Guarantee Act, 2005;[15] and the Bonded Labour System (Abolition) Act, 1976.[16]

The ugly face of the administration of justice surfaced before the apex court during the current year in the form of long delays in the disposal of criminal cases in which the high courts had granted stay orders on investigation after the registration of FIR, framing of charges or trial.[17] After calling for information from different high courts, the apex court found that a large number of criminal cases were pending for a long time (even upto eight years and more) before the high courts after grant of stay orders. The Supreme Court issued directions to the high courts not only for expeditious disposal of such cases but also reminded the high courts about the limits of their power under article 226 of the Constitution of India. The court also issued directions to the Law Commission of India to study the problem and submit a report to the court within six months. At the same time, the court held that delay in the trial of a criminal case cannot be a ground to quash on going criminal trial.[18]

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7 *Environment & Consumer Protection Foundation* v. *Delhi Administration*, 2012 (9) SCALE 692 : JT 2012 (10) SC 55 (Directions issued to ensure toilets for boys and girls in schools).

8 *People's Union for Civil Liberties* v. *Union of India*, 2012 (1) SCALE 213; (2012) 11 SCC 422, 728; (2012) 12 SCC 532; (2012) 12 SCC 357 (public distribution system).

9 *In re Amarnath Yatra* (2012) 12 SCC 492, 494, 497.

10 *Archaeological Survey of India* v. *Narender Anand* (2012) 2 SCC 562.

11 *Buddhadev Karmakar* v. *State of West Bengal*, 2012 (4) SCALE 566, 567.

12 *Safai Karamchari Andolan* v. *Union of India*, 2012 (10) SCALE 578, 580, 581

13 *Democratic Youth Federation of India* v. *Union of India*, 2012 (10) SCALE 568

14 *All India Drug Action Network* v. *Union of India*, 2012 (10) SCALE 572 (Further directions issued for revision of national list of essential medicines – upto date of order rep. in 2011 (13) SCALE 330).

15 *Centre for Environment & Food Securities* v. *Union of India*, 2012 (10) SCALE 566.

16 *Public Union for Civil Liberties* v. *State of Tamil Nadu*, 2012 (10) SCALE 256 : JT 2012 (10) SC 436 : (2013) 1 SCC 485.

17 *Imtiyaz Ahmad* v. *State of U.P.*, AIR 2012 SC 642.

18 *Ranjan Dwivedi* v. *C.B.I. Through the Director General*, AIR 2012 SC 3217 : JT 2012 (1) SC 557. This case was relied upon in *Shyam Babu* v. *State of U.P.*, AIR 2012 SC 3311. For expeditious disposal of cases pertaining to admissions in medical and dental courses, the apex court made "request to the Hon'ble Chief Justices of the respective High Courts to direct listing of all medical admission cases before one bench of the court as far as possible and in accordance with the Rules of that court. It would further be highly appreciable if the said Bench is requested to deal with such cases within a definite period, particularly during the period from July to October of a particular year. We express a pious hope that our request would weigh with the Hon'ble Chief Justices of the respective High Courts as it would greatly help in serving the ends of justice as well as the national interest": *Asha* v. *Pt. B.D. Sharma University of Health Sciences* (2012) 7 SCC 389; also see *Priya Gupta* v. *State of Chhattisgarh* (2012) 7 SCC 433.

Likewise, in *Baby Devassy Chully* v. *Union of India*,[19] the apex court reminded the high courts that in a matter affecting the personal liberty of a citizen, the courts were under a duty to make all efforts for an early decision. In the present case, the writ petition was kept pending for five months after hearing the parties. The court requested the High Courts to give priority for the disposal of cases relating to personal liberty, particularly after hearing the parties and when the detention period was for one year or less.

In some cases reported during the year, the Supreme Court refused to issue directions which it ordinarily does in public interest cases. In *V.K. Naswa* v. *Home Secretary, Union of India*,[20] a public interest petition was filed under article 32 of the Constitution praying the court to issue directions so that there was no misuse of National Flag as was allegedly done by Baba Ramdev. The apex court refused to do so and also refused to issue a direction to the respondent to enact a law for the purpose. Likewise, in *Sahara Real Estate Corp. Ltd.* v. *Securities & Exchange Board of India*,[21] the court refused to issue guidelines for the press regarding reporting of *sub judice* matters. Issuing directions without there being any effective mechanism to ensure their compliance hardly serves any useful purpose.

II LAW UNDER ARTICLE 13

In *Mithu* v. *State of Punjab*,[22] the Supreme Court had struck down the provisions of section 303 of the IPC, 1860, which was an existing law under article 13(1) of the Constitution, on the ground of arbitrariness as it left no discretion with the court in awarding the sentence to an accused who commits murder while undergoing life imprisonment. A similar controversy again came up before the Supreme Court in *State of Punjab* v. *Dalbir Singh*[23] with reference to section 27(3) of the Arms Act, 1959, which is a post-Constitution law. Section 27(3) reads as follows:

> (3) Whoever uses any prohibited arms or prohibited ammunition or does any act in contravention of section 7 and such use or act results in the death of any other person, shall be punishable with death.

Delineating the impact of section 27(3), Ganguly J observed:[24]

> Section 27(3) is very wide in the sense anything done in contravention of Section 7 of the Act and with the *use* of a prohibited arms and ammunition *resulting* in death will attract mandatory death penalty. Even if any act done in contravention of Section 7, namely, acquisition or possession, or manufacture or sale, of prohibited arms results in death of any person, the person in contravention of Section 7 shall be punished with death. This is

19 2012 (10) SCALE 176.
20 JT 2012 (3) SC 292; also see *Press Council of India* v. *Union of India*, 2012 (10) SCALE 86.
21 AIR 2012 SC 3829 : 2012 (8) SCALE 541 : JT 2012 (9) SC 123 : (2012) 10 SCC 603.
22 AIR 1983 SC 473 : (1983) 2 SCC 277.
23 AIR 2012 SC 1040 : (2012) 3 SCC 346.
24 *Id*. at 1045-46 (of AIR).

> a very drastic provision for many reasons. Apart from the fact that this imposes a mandatory death penalty the Section is so widely worded to the extent that if as a result of an accidental or unintentional use or any accident arising out of any act in contravention of Section 7, death results, the only punishment, which has to be mandatorily imposed on the person in contravention is, death. It may also be noted in this connection that language used is 'results' which is wider than the expression 'causes'. The word 'results' means the outcome and is wider than the expression 'causes'.
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> Therefore, very wide expression has been used in section 27(3) of the Act and without any guideline leading to mandatory punishment of death penalty.

Ganguly J, holding the provisions of section 27(3) unreasonable, further observed:[25]

> (I)t appears that in Section 27(3) of the Act the provision of mandatory death penalty is more unreasonable inasmuch it provides whoever uses any prohibited ammunition or acts in contravention of Section and if such *use* or *act results* in the death of any other person then that person guilty of such use or acting in contravention of Section 7 shall be punishable with death. The word 'use' has not been defined in the Act. Therefore, the word 'use' has to be viewed in its common meaning. In view of such very wide meaning of the word 'use' even an unintentional or accidental use resulting in death of any other person shall subject the person so using to a death penalty. Both the words 'use' and 'result' are very wide. Such a law is neither just, reasonable nor is it fair and falls out of the 'due process' test.
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> A law which is not consistent with notions of fairness while it imposes an irreversible penalty like death penalty is repugnant to the concept of right and reason. ...XXX
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> By imposing mandatory death penalty, Section 27(3) of the Act runs contrary to those statutory safeguards which give judiciary the discretion in the matter imposing death penalty. Section 27(3) of the Act is thus *ultra vires* the concept of judicial review which is one of the basic features of our Constitution.

In view of the above observations, the court quashed section 27(3) of the Arms Act, which is a post-Constitution law and in contravention of article 13(2), being violative of the fundamental rights under articles 14 and 21.

III RIGHT TO EQUALITY

Creation of alternative forum for adjudication of disputes not against rule of law

The Legal Services Authority Act, 1987, as amended in 2002, envisages the establishment of permanent lok adalats for adjudication of disputes regarding public utilities. The lok adalat consists of three members, two of whom are non-judicial

25 *Id.* at 1060-61.

members. The provisions of the Code of Civil Procedure, 1908 (CPC) and the Indian Evidence Act, 1872 have been made inapplicable to the proceedings before the lok adalats which are required to act in accordance with the principles of natural justice. The jurisdiction of lok adalats is upto rupees 10 lakhs, subject to enhancement by the central government. The decisions of the lok adalats have been made final and binding and no appeal lies against them.

Upholding the validity of the amendments, R.M. Lodha J observed:[26]

> Parliament can definitely set up effective alternative institutional mechanisms or make arrangements which may be more efficacious than the ordinary mechanism of adjudication of disputes through the judicial courts. Such institutional mechanisms or arrangements by no stretch of imagination can be said to be contrary to constitutional scheme or against the rule of law. The establishment of Permanent Lok Adalats and conferring them jurisdiction up to a specific pecuniary limit in respect of one or more public utility services as defined in Section 22-A(*b*) before the dispute is brought before any court by any party to the dispute is not anathema to the rule of law. Instead of ordinary civil courts, if other institutional mechanisms are set up or arrangements are made by Parliament with an adjudicatory power, in our view, such institutional mechanisms or arrangements cannot be faulted on the ground of arbitrariness or irrationality.

Mere inconvenience in implementation of a provision is not violative of art. 14

Under the Indian Medicine Central Council Act, 1970, the central government has power to hold elections for the constitution of Central Council of Indian Medicine. An elected or nominated member holds office for five years "or until his successor shall have been duly elected or nominated, whichever is longer." By virtue of this provision, the members of the council continued to remain in office for over twenty-five years as no elections were held. The question was whether section 7 violated the provisions of articles 14 and 16 of the Constitution as the members can continue with their membership for an indefinite period of time by virtue of section 7. In a public interest petition filed under article 32, the apex court held that merely because there was some inconvenience arising out of the language of section 7 and its proper implementation, the provision could not be held to be violative of a fundamental right. Section 7 did not suffer from any legal infirmity, excessive legislative power or violate the right of any person, much less a constitutional right, Swatanter Kumar J held. The judge, however, did appreciate the laxity of the central government in not holding the elections for a very long period of time and, therefore, he issued directions to the central government to complete the election process before the expiry of the term of the members and, in any case, within a maximum period of three months after the completion of five year term.[27]

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26 *Bar Council of India* v. *Union of India*, AIR 2012 SC 3246 at 3255.

27 *K.B. Nagur, M.D. (Ayu.)* v. *Union of India*, AIR 2012 SC 1774 at 1782.

Validity of compulsory requirement of admission of children

Article 14 does not prohibit reasonable classification if the same is founded on an intelligent differentia which distinguishes persons or things that are grouped together from others left out of the group and the differentia has a rational basis to the object sought to be achieved thereby.[28] Despite this clear and un-ambiguous proposition, controversy remains always alive as to the actual application of this proposition. Section 12(1)(c) of the Right of Children to Free and Compulsory Education Act, 2009 requires all aided and un-aided private schools to admit, to the extent of upto 25 per cent, students between 6 to 14 years of age belonging to disadvantaged groups. In the *Rajasthan* case, the Supreme Court held that the provision was not violative of article 14. Kapadia CJI observed:[29]

> Section 12(1)(*c*) inter alia provides for admission to Class I, to the extent of 25% of the strength of the class, of the children belonging to weaker sections and disadvantaged group in the neighbourhood and provide free and compulsory elementary education to them till its completion. The emphasis is on "free and compulsory education". Earmarking of seats for children belonging to a specified category who face financial barrier in the matter of accessing education satisfies the test of classification in Article 14. Further, Section 12(1)(*c*) provides for a level playing field in the matter of right to education to children who are prevented from accessing education because they do not have the means or their parents do not have the means to pay for their fees.… (E)ducation is an activity in which we have several participants. There are number of stakeholders including those who want to establish and administer educational institutions as these supplement the primary obligation of the state to provide *for* free and compulsory education to the specified category of children. Hence, Section 12(1)(*c*) also satisfies the test of reasonableness, apart from the test of classification in Article 14.

No equality to perpetuate illegality

The principle of equality is a positive concept and does not apply in cases of illegality. If a person has received some benefit which is illegal, another person cannot claim that benefit. In *Usha Mehta* v. *Govt. of A.P.,*[30] the court reiterated this well known principle by holding that the court cannot command the state that it should perpetuate an illegality or pass wrong order because in another case such an illegality had been committed or wrong order had been passed. If any illegality or irregularity had been committed in favour of an individual or a group of individuals, others cannot invoke the jurisdiction of the writ court seeking a direction that the same irregularity or illegality be committed in their favour.

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28 *Charanjit Lal Chaudhary* v. *Union of India*, AIR 1951 SC 41 and a catena of judicial pronouncements till date including *Society for Un-Aided P. School of Rajasthan* v. *Union of India*, AIR 2012 SC 3445. (hereinafter cited as *Rajasthan* case).

29 *Id.* at 3462.

30 (2012) 12 SCC 419.

Arbitrary action/decisions

In matters of selections for appointment, it is necessary that all the requirements given in the advertisement are scrupulously followed in order to ensure equality among the candidates. Any relaxation, not envisaged in the advertisement, would be arbitrary and violative of article 14 of the Constitution. In *Bedanga Talukdar* v. *Saifudaullah Khan,* the court held:[31]

> (I)t is too well settled to need any further reiteration that all appointments to public office have to be made in conformity with Article 14 of the Constitution of India. In other words, there must be no arbitrariness resulting from any undue favour being shown to any candidate. Therefore, the selection process has to be conducted strictly in accordance with the stipulated selection procedure. Consequently, when a particular schedule is mentioned in an advertisement, the same has to be scrupulously maintained. There cannot be any relaxation in the terms and conditions of the advertisement unless such a power is specifically reserved. Such a power could be reserved in the relevant statutory rules. Even if power of relaxation is provided in the rules, it must still be mentioned in the advertisement. In the absence of such power in the rules, it could still be provided in the advertisement. However, the power of relaxation, if exercised, has to be given due publicity. This would be necessary to ensure that those candidates who become eligible due to the relaxation, are afforded an equal opportunity to apply and compete. Relaxation of any condition in advertisement without due publication would be contrary to the mandate of equality contained in Articles 14 and 16 of the Constitution of India.

In this case, in the absence of there being any power in the advertisement to relax any of the requirements, the direction of the high court to relax the requirement of submission of disability certificate was quashed by the apex court. Likewise, the destruction of answer books of a competitive examination within a few days after the announcement of result of selection with a view to prevent the court from scrutinising the fairness of selection was held to be arbitrary. Quashing the entire selections, the court ordered fresh written test and interview.[32]

Non-discriminatory action/decisions

In *Food Corpn. of India* v. *Bhartiya Khadya Nigam Karmchari Sangh*,[33] the court did not find any discrimination in the action of the appellant by which incentive in the form of two increments was granted only to its in-service employees who acquired professional qualifications after entering the service while denying the same to those who had already acquired the same qualification before entering the service. The object of giving the incentive was to encourage the in-service employees to get professional degrees. Likewise, grant of selection grade to those who had good service record while deferring the same by one year to those who had earned

31 AIR 2012 SC 1803 at 1810.

32 *Poonam Rani* v. *State of Haryana*, AIR 2012 SC 1811.

33 AIR 2012 SC 703; see also *State of M.P.* v. *Rakesh Kohli*, AIR 2012 SC 1811.

censure was held to be non-discriminatory as the classification between the two categories of employees was held to be reasonable. Had both these categories of employees been treated equal by giving all of them selection grade, it would have been violative of article 14.[34]

IV DISTRIBUTION OF STATE LARGESSE

The decision of the Supreme Court in *Centre for PIL* v. *Union of India* (2G spectrum case),[35] gave a big blow to the action of the government in allocating scarce natural resources by adopting 'first come, first served' policy. The apex court in numerous decisions had emphasized transparency, equality and fairness to all eligible candidates while awarding government contracts or licences. G.S. Singhvi, J observed:[36]

> There is a fundamental flaw in the first-come-first served policy inasmuch as it involves an element of pure chance or accident. In matters involving award of contracts or grant of licence or permission to use public property, the invocation of first-come-first served policy has inherently dangerous implications. Any person who has access to the power corridor at the highest or the lowest level may be able to obtain information from the Government files or the files of the agency/instrumentality of the State that a particular property or asset is likely to be disposed of or a contract is likely to be awarded or a licence or permission is likely to be given, he would immediately make an application and would become entitled to stand first in the queue at the cost of all others who may have a better claim. . . . (T)he State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. When it comes to alienation of scarce resources like spectrum etc., it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which necessarily result in protection of national/public interest.

While indicating the best method for doing so, Singhvi J observed:[37]

> In our view, a duly publicized auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values.

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34 *State of Rajasthan* v. *Shankar Lal Parmar*, AIR 2012 SC 1913.

35 AIR 2012 SC 3725; see also *Saroj Screens Pvt. Ltd*. v. *Ghanshyam*, AIR 2012 SC 1649; *M/s. Michigan Rubber (India) Ltd.* v. *State of Karnataka* (2012) 8 SCC 216; *NTPC Ltd.* v. *Ansaldo Caldaie Boilers India P. Ltd.* (2012) 4 SCC 471.

36 AIR 2012 SC 3725 at 3762.

37 *Ibid.*

The court declared that the licences granted to private parties and allocation of spectrum in 3G band on the basis of 'first come, first served' policy was arbitrary and declared the same to be unconstitutional. The court also held that the central government shall consider the recommendations of the TRAI for grant of licences and allocation of spectrum in 2G band in 22 service areas by auction and take appropriate decision within one month and "fresh licences be granted by auction."

The above observations of the court, though related to 2G spectrum only, gave an impression that the only method of allocating all natural resources/state properties was "auction" which was not acceptable to the central government. Consequently, the President of India made a reference under article 143 seeking the advice of the Supreme Court *inter alia* on the question as to whether auction was the *only* method of allocating natural resources/state properties.[38] The court pointed out:[39]

> The President seeks this Court's opinion on the limited point of permissibility of methods other than auction for alienation of natural resources, other than spectrum. The question also harbours several concepts, which were argued before us through the hearing of the Reference, that require to be answered in order to derive a comprehensive answer to the parent question:
> (*i*) Are some methods ultra vires and others intra vires the Constitution of India, especially Article 14?
> (*ii*) Can disposal through the method of auction be elevated to a constitutional principle?
> (*iii*) Is this Court entitled to direct the executive to adopt a certain method because it is the "best" method? If not, to what extent can the executive deviate from such "best" method?

Explaining the mis-understanding about the views of the court expressed in *Centre for PIL*, quoted above, to the effect that auction was "perhaps" the best method for allocation of spectrum and natural resources, D.K. Jain J held:[40]

> (T)he Court was not considering the case of auction in general, but specifically evaluating the validity of those methods adopted in the distribution of spectrum from September 2007 to March 2008. It is also pertinent to note that reference to auction is made in the subsequent para 96 with the rider "perhaps". It has been observed that "a duly publicised auction conducted fairly and impartially is *perhaps* the best method for discharging this burden". We are conscious that a judgment is not to be read as a statute, but at the same time, we cannot be oblivious to the fact that when it is argued with vehemence that the judgment lays down auction as a constitutional principle, the word "perhaps" gains significance. This suggests that the recommendation of auction for alienation of natural resources was never intended to be taken as an absolute or blanket statement

38 *Natural Resources Allocation, In re, Special Reference No. 1 of 2012* (2012) 10 SCC 1.
39 *Id.* at 72-73.
40 *Id.* at 71-72.

> applicable across all natural resources, but simply a conclusion made at first blush over the attractiveness of a method like auction in disposal of natural resources. The choice of the word "perhaps" suggests that the learned Judges considered situations requiring a method other than auction as conceivable and desirable.

The court further held that the final conclusions of the judgment did not mention about auction being the only permissible method for disposal of natural resources and, therefore, the findings were limited to the case of spectrum only. The judge also pointed out other implications of the judgment in *Centre for PIL* thus:[41]

> Moreover, if the judgment in *2G case* is to be read as holding auction as the only permissible means of disposal of all natural resources, it would lead to the quashing of a large number of laws that prescribe methods other than auction e.g. the MMDR Act. While dealing with the merits of the Reference, … it would suffice to say that no court would ever implicitly, indirectly, or by inference, hold a range of laws as ultra vires the Constitution, without allowing every law to be tested on its merits. One of the most profound tenets of constitutionalism is the presumption of constitutionality assigned to each legislation enacted. We find that *2G case* does not even consider a plethora of laws and judgments that prescribe methods, other than auction, for dispensation of natural resources; something that it would have done, in case it intended to make an assertion as wide as applying auction to all natural resources. Therefore, we are convinced that the observations in paras 94 to 96 could not apply beyond the specific case of spectrum, which according to the law declared in *2G case*, is to be alienated only by auction and no other method.

The court thus came to the conclusion that 2G spectrum case did not deal with modes of allocation for natural resources other than spectrum. Explaining the purpose of disposing of natural resources, the court observed:[42]

> Therefore, in conclusion, the submission that the mandate of Article 14 is that any disposal of a natural resource for commercial use must be for revenue maximisation, and thus by auction, is based neither on law nor on logic. There is no constitutional imperative in the matter of economic policies - Article 14 does not predefine any economic policy as a constitutional mandate. Even the mandate of Article 39(*b*) imposes no restrictions on the means adopted to subserve the public good and uses the broad term "distribution", suggesting that the methodology of distribution is not fixed. Economic logic establishes that alienation/allocation of natural resources to the highest bidder may not necessarily be the only way to subserve the common good, and at times, may run counter to public good. Hence, it needs little emphasis that disposal of all natural resources through auctions is clearly not a constitutional mandate.

41 *Id.* at 72.
42 *Id*. at 88.

The court conceded that it was not for the court but the executive to decide the method of allocation of natural resources. It held:[43]

> Hence, it is manifest that there is no constitutional mandate in favour of auction under Article 14. The Government has repeatedly deviated from the course of auction and this Court has repeatedly upheld such actions. The judiciary tests such deviations on the limited scope of arbitrariness and fairness under Article 14 and its role is limited to that extent. Essentially, whenever the object of policy is anything but revenue maximisation, the executive is seen to adopt methods other than auction.
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> *A fortiori*, besides legal logic, mandatory auction may be contrary to economic logic as well. Different resources may require different treatment. Very often, exploration and exploitation contracts are bundled together due to the requirement of heavy capital in the discovery of natural resources. A concern would risk undertaking such exploration and incur heavy costs only if it was assured utilisation of the resource discovered: a prudent business venture would not like to incur the high costs involved in exploration activities and then compete for that resource in an open auction. The logic is similar to that applied in patents. Firms are given incentives to invest in research and development with the promise of exclusive access to the market for the sale of that invention. Such an approach is economically and legally sound and sometimes necessary to spur research and development. Similarly, bundling exploration and exploitation contracts may be necessary to spur growth in a specific industry. Similar deviation from auction cannot be ruled out when the object of a state policy is to promote domestic development of an industry.

The court repelled the argument about potential abuse of the power in selecting the mode of allocation holding that:[44]

> (A) potential for abuse cannot be the basis for striking down a method as ultra vires the Constitution. It is the actual abuse itself that must be brought before the court for being tested on the anvil of constitutional provisions. In fact, it may be said that even auction has a potential of abuse, like any other method of allocation, but that cannot be the basis of declaring it as an unconstitutional methodology either. These drawbacks include cartelisation, the "winner's curse" (the phenomenon by which a bidder bids a higher, unrealistic and unexecutable price just to surpass the competition; or where a bidder, in case of multiple auctions, bids for all the resources and ends up winning licences for exploitation of more resources than he can pragmatically execute), etc. However, all the same, auction cannot be called ultra vires for the said reasons and continues to be an attractive and preferred means of disposal of natural resources especially when revenue maximisation is a priority. Therefore, neither

43 *Id.* at 92.
44 *Id.* at 93-94.

auction, nor any other method of disposal can be held ultra vires the Constitution, merely because of a potential abuse.

In the ultimate analysis, the court held that "auction despite being a more preferable method of alienation/allotment of natural resources, cannot be held to be a constitutional requirement or limitation for alienation of all natural resources and therefore, every method other than auction cannot be struck down as ultra vires the constitutional mandate."

V RESERVATION IN ADMISSIONS AND CARRY FORWARD RULE

The Supreme Court in *Ashoka Kumar Thakur* v. *Union of India*,[45] had upheld the constitutional validity of the Constitution (Ninety-third Amendment) Act, 2005 by which clause (5)[46] was inserted empowering the state to make special provision for the advancement of socially and educationally backward classes (OBCs), scheduled castes (SCs) and scheduled tribes (STs) in relation to their admission to educational institutions including private educational institutions, whether aided or unaided by the state, other than the minority educational institutions referred to in clause (1) of article 30. The majority, however, did not decide the question of validity of the amendment insofar as the private un-aided educational institutions were concerned.[47] Bhandari, J. in his opinion, however, considered the issue and held that the Constitution (Ninety-third Amendment) Act, 2005 was un-constitutional so far as private unaided educational institutions were concerned. In that case, the court had also upheld the constitutional validity of the Central Educational Institutions (Reservation in Admission) Act, 2006 by which 27 per cent seats were reserved for OBCs excluding creamy layer. The majority of the judges were of the view that the review should be made as to the need for continuance of reservation at the end of 5 years. Bhandari, J, also held that in order to maintain standards of excellence, it would be reasonable to balance OBC reservation with societal interests and cut-off marks for OBCs should be set not more than 10 marks out of 100 below that of the general. Pasayat, J also expressed the view that maximum cut-off marks for OBCs be 10 per cent below the cut-off marks of general category candidates.

In *P.V. Indiresan (1)* v. *Union of India*,[48] the court clarified that the maximum cut-off marks for OBCs be 10 per cent below the cut-off marks of general category

45 (2008) 6 SCC 1.

46 Cl. (5) of art. 15 reads: "(5) Nothing in this article or in sub-clause (*g*) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30."

47 The question of constitutional validity of reservation in private un-aided non-minority educational institutions envisaged under cl (5) of art. 15 was referred to a larger bench in *Pramati Educational and Cultural Trust* v. *Union of India* (2013) 5 SCC 752.

48 (2009) 7 SCC 300.

candidates. Consequently, the Government of India, by official memorandum dated 17-10-2008, directed all the central educational institutions to ensure that the maximum cut-off marks for OBCs were not kept lower than 10 per cent from the cut-off marks for general category candidates as directed by the court.

The question again cropped up in *P.V. Indiresan (2)* v. *Union of India*,[49] as to the meaning to be assigned to the direction regarding the maximum cut-off marks for OBCs to be 10 per cent below the cut-off marks of general category candidates. The contradictory stand was stated by the court thus:[50]

> The clarificatory order dated 14-10-2008 in *P.V. Indiresan (1)* v. *Union of India* [(2009) 7 SCC 300] which stated that the "*maximum cut-off marks for OBCs be 10% below the cut-off marks of general category candidates*" is sought to be interpreted differently by the appellant and the respondents, with reference to the said observation. The appellant contends that the "cut-off marks of general category candidates" refers to the marks secured by the last candidate who secures a seat under general category and therefore only such OBC students who have secured marks in the bandwidth of 10% below the marks secured by the last general category candidate, will be entitled to admission. On the other hand, the respondents contend that the words "cut-off marks of general category candidates" were used to refer to the minimum eligibility/qualifying marks prescribed for admission to the course under general category.

While interpreting the connotation of the term "cut off marks", the court stated:[51]

> The minimum eligibility marks for admission to a course of study is always declared before the admission programme for an academic year is commenced. An institution may say that for admissions to its course, say Bachelor's degree course in Science, the candidate should have successfully completed a particular course of study, say 10 + 2, with certain special subjects. Or it can say that the candidate should have secured certain prescribed minimum marks in the said qualifying examination, which may be more than the percentage required for passing such examination. For example, if a candidate may pass a 10 + 2 examination by securing 35% marks, an institution can say at its discretion that to be eligible for being admitted to its course of study, the candidate should have passed with at least a minimum of 40% or 50% or 60%. Whatever be the marks so prescribed, it should be uniform to all applicants and a prospective applicant should know, before he makes an application, whether he is eligible for admission or not. But the "cut-off" procedure followed by JNU during those days had the effect of rewriting the eligibility criteria, after the applications were received from eligible candidates. If the minimum eligibility prescribed for an admission in an institution was 50% and a

49 (2011) 8 SCC 441.
50 *Id*. at 461.
51 *Id.* at 469-73.

> candidate had secured 50%, he could not be denied admission, if a seat was available, based on a criterion ascertained after the last date for submission of applications.
>
> No candidate who fulfils the prescribed eligibility criteria and whose rank in the merit list is within the number of seats available for admission, can be turned down, by saying that he should have secured some higher marks based on the marks secured by some other category of students. A factor which is neither known nor ascertained at the time of declaring the admission programme cannot be used to disentitle a candidate to admission, who is otherwise entitled for admission. If the total number of seats in a course is 154 and the number of seats reserved for OBCs is 42, all the seats should be filled by OBC students in the order of merit from the merit list of OBC candidates possessing the minimum eligibility marks prescribed for admission (subject to any requirement for entrance examination). When an eligible OBC candidate is available, converting an OBC reservation seat to general category is not permissible. ...XXX
>
> The order dated 14-10-2008 means that where minimum eligibility marks in the qualifying examinations are prescribed for admission, say as 50% for general category candidates, the minimum eligibility marks for OBCs should not be less than 45% (that is, 50 less 10% of 50). The minimum eligibility marks for OBCs can be fixed at any number between 45 and 50, at the discretion of the institution. Or, where the candidates are required to take an entrance examination and if the qualifying marks in the entrance examination are fixed as 40% for general category candidates, the qualifying marks for OBC candidates should not be less than 36% (that is, 40 less 10% of 40).

In *Faiza Choudhary* v. *State of J&K,*[52] the court held that a medical seat had life only in the year it falls, that too only till the cut-off date fixed by the court, *i.e*. 30th September every year. Carry-forward principle was held to be unknown to the professional courses like medical, engineering, dental, *etc*. If any educational board or institution indulges in such an exercise, in the absence of any rule or regulation, that will be at the expense of other meritorious candidates waiting for admission in the succeeding years.

VI RESERVATION IN APPOINTMENTS AND PROMOTIONS IN PUBLIC SERVICES

In *Mandal Commission* case,[53] while upholding the validity of reservation to socially and educationally backward classes, the Supreme Court had clearly held that no reservation could be made in promotions by virtue of the provisions of clause (4) of article 16. Consequently, Constitution (Seventy-seventh Amendment) Act, 1995 was passed inserting clause (4-A) in article 16 enabling the state for

52 (2012) 10 SCC 149.

53 *Indra Sawhney* v. *Union of India*, AIR 1993 SC 477.

"making provision for the reservation in matters of promotion"[54] to any class or classes of posts in the services under the state in favour of scheduled castes and scheduled tribes which, in the opinion of the state, are not adequately represented. The Supreme Court upheld the constitutional validity of clause (4-A) in *M. Nagaraj* v. *Union of India*[55] with certain riders. The court held that reservation under clause (4-A) was merely an enabling provision (as compared to a mandatory provision)[56] and reservation in promotion could be given only on fulfillment of certain conditions, *viz*. "backwardness", "inadequacy of representation" as provided under clause (4-A) of article 16 and "maintenance of efficiency of administration" as required in article 335 of the Constitution. Unless these conditions are satisfied, the enabling provision of clause (4-A) cannot be enforced. Further, the enabling provision under clause (4-A) may be constitutionally valid, yet the "exercise of power" by the state in a given case may be arbitrary, particularly, if the state fails to identify and measure inadequacy of representation keeping in mind the maintenance of efficiency of administration as required under article 335.[57] The state has to form its opinion on the basis of quantifiable data regarding inadequacy of representation. If the parameters of articles 16(4-A) and 335 are not kept in mind while giving reservation in promotion to the scheduled castes and scheduled tribes, the court would strike down the reservation as being unconstitutional. The court was of the view that article 16(4-A) protects the interests of certain sections of society and same has to be balanced against article 16(1) which protects every citizen of the country who have right to be treated equally under article 14. S.H. Kapadia, J, on behalf of the constitution bench of five judges, while upholding the constitutional validity of clause (4-A) of article 16, observed:[58]

> The impugned constitutional amendments by which Article 16(4-A) and (4-B) have been inserted flow from Article 16(1). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), sub-classification between OBCs on one hand and SCs and STs on the other hand….

Thus the constitutional validity of clause (4-A) was upheld not in absolute terms but only because that clause and other constitutional limitations indicated in

54 The words "with consequential seniority" were added by the Constitution (Eighty-fifth Amendment) Act, 2001.

55 AIR 2007 SC 71 : (2006) 8 SCC 212.

56 See *Dr. Gulshan Prakash* v. *State of Haryana* (2009) 14 SCALE 290; S.N. Singh, "Constitutional Law – I (Fundamental Rights)", XLV *ASIL* 125 at 132 (2009); *K. Madhusudana Rao* v. *H. Shiva Ram*, 2012 (3) ALT 353 (DB).

57 *U.P. Power Corpn. Ltd.* v. *Rajesh Kumar*, *supra* note 3.

58 *Supra* note 55 at 278 (of SCC).

the judgment were there. In the absence of all those limitations, clause (4-A) may not have stood the test of validity before the court as the basis for making reservations contemplated in clause (4) of article 16 would have been non-existent.

As the exercise indicated in *M. Nagraj*[59] had not been undertaken by the state of Rajasthan while giving reservations in promotion, the government notification giving reservation in promotions was quashed in *Suraj Bhan Meena* v. *State of Rajasthan*.[60]

Applying the above principles, the Supreme Court in *U.P. Power Corpn. Ltd*. v. *Rajesh Kumar*,[61] upheld the decision of the Lucknow bench of Allahabad High Court given in *Prem Kumar Singh* v. *State of U.P*.,[62] quashing section 3(7) of the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 read with rule 8-A of the U.P. Government Servants Seniority Rules, 1991 as enforced from 2007 on the ground that the Act was invalid, *ultra vires* and unconstitutional. Dipak Misra J held:[63]

> We are of the firm view that a fresh exercise in the light of the judgment of the Constitution Bench in M. Nagaraj is a categorical imperative. The stand that the constitutional amendments have facilitated the reservation in promotion with consequential seniority and have given the stamp of approval to the Act and the Rules cannot withstand close scrutiny inasmuch as the Constitution Bench has clearly opined that Articles 16(4A) and 16(4B) are enabling provisions and the State can make provisions for the same on certain basis or foundation. The conditions precedents have not been satisfied. No exercise has been undertaken. What has been argued

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59 *Ibid.*

60 (2011) 1 SCC 467 : AIR 2011 SC 874; see S N Singh, "Constitutional Law – I (Fundamental Rights)", XLVII *ASIL* 171 at 186-87 (2011).

61 *Supra* note 3; see also *General Category Welfare Federation* v. *Union of India*, *supra* note 3, in which the Supreme Court allowed the writ petition to be withdrawn with liberty to approach the high court which would decide the matter in the light of principles laid down in *M. Nagaraj* v. *Union of India*, *supra* note 55; *Salauddin Ahmed* v. *Samta Andolan*, AIR 2012 SC 3891*; State of Rajasthan* v. *Bajrang Lal Sharma* (2012) 10 SCC 255; *S.V. Joshi* v. *State of Karnataka* (2012) 7 SCC 41, in which the constitutional validity of the Tamil Nadu Backward Classes, SCs and STs (Reservation of Seats in Educational Institutions and of Appointment or Posts in the Services under the State) Act, 1993 and the Karnataka Scheduled Castes, Scheduled Tribes and Other Backward Classes (Reservation of Seats in Educational Institutions and of Appointment or Posts in the Services under the State) Act, 1994 was challenged on the ground that these legislations had permitted reservation of more than 50% without relying on any quantifiable data as laid down in *M. Nagaraj* v. *Union of India*, *supra* note 55 and *Ashoka Kumar Thakur* v. *Union of India* (2008) 6 SCC 1. The Supreme Court directions to the states concerned to decide the *quantum* of reservation on the basis of the above two decisions and the *interim* directions already issued were allowed to continue till one year within which the states were directed to decide the matter. Liberty was also given to the petitioners to approach the Supreme Court again if the directions were not complied with.

62 2011 (3) ALJ 343.

63 *Supra* note 3 at 2753.

> with vehemence is that it is not necessary as the concept of reservation in promotion was already in vogue. We are unable to accept the said submission, for when the provisions of the Constitution are treated valid with certain conditions or riders, it becomes incumbent on the part of the State to appreciate and apply the test so that its amendments can be tested on parameters laid down therein.
>
> In the ultimate analysis, we conclude and hold that section 3(7) of the 1994 Act and rule 8A of the 2007 rules are *ultra vires* as they run counter to the dictum in *M. Nagaraj*.

There is nothing new in the above observation of Misra J; it merely reiterated what had already been held in *M. Nagaraj* case. But this decision of the apex court would certainly go a long way clarifying again a controversial issue concerning equality to all citizens in matters of promotions in public services. The court repelled all contentions of the state in giving reservation without any consideration to the earlier decisions of the apex court which had clearly stipulated that reservation in promotions could be made in favour of scheduled castes and scheduled tribes provided the same could be justified on the ground of backwardness and inadequacy of representation in the services while at the same time maintaining efficiency of administration.

M. Nagaraj case was decided by the Supreme Court in 2006 but no steps have been taken till now either by the central government or by any state government to do homework for ascertaining the conditions precedent for giving reservation in promotions though the governments were very prompt in giving the reservations immediately after the decision for gaining political mileage. It may also be noted that neither the centre nor any state government has taken any steps to ascertain as to which "backward classes of citizens" are "not adequately represented in the services under the State" as required under clause (4) of article 16 for considering reservation to backward classes of citizens even though large-scale reservations have been given to them since 1990. In order to nullify the impact of the decision, the central government, while introducing the Constitution (117th Amendment) Bill, 2012[64] in Rajya Sabha, strangely and shamelessly, in the objects and reasons attached

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64 The decision created a lot of furor from certain quarters who criticized the judgment and demanded a constitutional amendment to nullify the impact of the decision. Consequentally, the Constitution (117th Amendment) Bill, 2012, was introduced in Rajya Sabha on 04.09.2012 "with a view to provide impediment-free reservation in promotion to the Scheduled Castes and the Scheduled Tribes" but the bill was opposed by many political parties. The bill is still pending. The bill seeks to substitute existing cl (4A) to art. 16 with the following:

> "(4A) Notwithstanding anything contained elsewhere in the Constitution, the Scheduled Castes and the Scheduled Tribes notified under article 341 and article 342, respectively, shall be deemed to be backward and nothing in this article or in article 335 shall prevent the State from making any provision for reservation in matters of promotions, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes to the extent of the percentage of reservation provided to the Scheduled Castes and the Scheduled Tribes in the services of the State."

to the bill, pointed out the difficulty in the collection of quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment. It may be stated here that without doing that, reservation in promotion is not permissible under the existing constitutional scheme as interpreted by the Supreme Court. Moreover, it would be an absurd proposition to state that a new law should be made or an existing one be repealed/modified merely because of "difficulty" in collecting necessary data or information. If the government's stand is accepted, even for the sake of argument, the provisions of clauses (4) and (4-A) of article 16 and articles 335, which contain the entire basis and philosophy of reservations for scheduled castes, scheduled tribes and backward classes, would become meaningless. Also, the basis for upholding the validity of reservations made under clauses (4) and (4-A) of article 16 is that the reservation is not blanket but subject to three conditions, *viz.*, backwardness, inadequate representation and maintenance of efficiency of administration. If these requirements are destroyed, as was sought to be done through the proposed 117th constitutional amendment providing that "the Scheduled Castes and the Scheduled Tribes notified under article 341 and article 342, respectively, shall be deemed to be backward" and that "Notwithstanding anything contained elsewhere in the Constitution" nothing "shall prevent the State from making any provision for reservation in matters of promotions, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes to the extent of the percentage of reservation provided to the Scheduled Castes and the Scheduled Tribes in the services of the State", the very basis of reservation disappears and the reservation itself becomes invalid. The proposed amendment, therefore, cannot stand the scrutiny of the court.

It may further be remembered that though the ceiling for total reservation is less than 50 per cent, in reality, as per apex court's decisions, the actual number of posts in public services and seats in educational institutions available for general category candidates is considerably reduced, say 20-25 per cent, since reserved category candidates qualifying with general category candidates are not adjusted against reserved seats/posts and there is always a considerable number of such candidates.

The policy of reservation which was intended to be a temporary measure to be in operation for a very limited class of people for a limited period of time has become a permanent feature expanding its scope and coverage day by day without any justified reasons/grounds. The action of the state in increasing the percentage of reservation upto maximum permissible limit stipulated by the Supreme Court and giving its benefit to ever expanding list of persons identified solely on the basis of caste or religion definitely indicates the failure of the state in reducing "social and educational backwardness" and in uplifting the status of the classes of persons covered under SC/ST category during last over six decades. Unfortunately, the national commission for scheduled castes and the national commission for scheduled tribes established under articles 338 and 339, respectively of the Constitution have consistently failed to discharge their constitutional obligation of evaluating the "progress" of socio-economic development of these two categories of persons under the union and the states as mandated under articles 338(5)(c) and article 338-A(5)(c).

It must be kept in mind that giving of concessions/reservations to one category of persons even without proper data/information at the cost of others has the worst effect of dividing the population resulting in avoidable tensions and reverse discrimination. While the concept of 'creamy layer' was propounded by the Supreme Court for denying the benefit of reservation to socially and educationally backward classes, no such concept applies in the case of scheduled castes and scheduled tribes who are reaping the benefit of reservation since 1950. How is reservation justified for highly affluent among the scheduled castes and scheduled tribes who have been beneficiaries for such a long time?

Further, while the class deriving the benefit of concession/reservation gets an automatic feeling that they are "backward", those deprived of them feel jealous that they are deprived of their constitutional right to equality despite they being more meritorious for no fault of theirs or merely because they do not belong to a particular caste/class/religion on which they have no control. It may also be remembered that while upholding the constitutional validity of the Central Educational Institutions (Reservation in Admission) Act, 2006 by which 27 per cent seats were reserved for OBCs excluding creamy layer, the majority of the judges were of the view that review should be made as to the need for continuance of reservation at the end of every five years.[65] Nothing has begun till date even though five years have lapsed. A time has, therefore, come when it becomes imperative for the central government to constitute a high powered commission headed by a retired judge of the Supreme Court to go through the entire gamut of issues pertaining to reservations to all categories of citizens, particularly with a view to ascertain as to who have been the beneficiaries of reservations till date and whether time is ripe to do away with all kinds of reservations, replacing the present day reservation system with some other kind(s) of affirmative action programmes. Instead of expanding the scope of concessions/reservations to appease some class/category of persons for extraneous considerations as at present, all efforts must be genuinely made to scrap them and take other effective measures to bring about real "equality" to all classes and categories of persons in the country which is governed by rule of law.

VII FREEDOM OF PRESS

It is invariably argued that the press does not require external regulation; regulation must come from within. This argument was completely knocked down by the Supreme Court in *Mohammed Ajmal Mohammad Amir Kasab* v. *State of Maharashtra,*[66] which proves the negative aspects of the freedom of the press and the irresponsible conduct of the journalists. This case related to terrorists attack in Mumbai on 26th November 2008 at three places: Taj Hotel, Hotel Oberoi and Nariman House. The role of electronic media is depicted in the following narration given by the court:[67]

65 *Ashoka Kumar Thakur* v. *Union of India* (2008) 6 SCC 1.
66 AIR 2012 SC 3565.
67 *Id.* at 3662.

> (T)he terrorists attacks at all the places, in the goriest details, were shown live on the Indian TV from beginning to end almost non-stop. All the channels were competing with each other in showing the latest developments on a minute to minute basis, including the positions and movements of the security forces engaged in flushing out the terrorists. The reckless coverage of the terrorist attack by the channels thus gave rise to a situation where on the one hand the terrorists were completely hidden from the security forces and they had no means to know their exact position or even the firearms and explosives they possessed and on the other hand the positions of the security forces, their weapons and all their operational movements were being watched by the collaborators across the border on TV and were communicated to the terrorists.

The court expressed its anguish when it pointed out that:[68]

> (I)t is not possible to find out whether the security forces actually suffered any casualty or injuries on account of the way their operations were being displayed on the TV screen. But it is beyond doubt that the way their operations were freely shown made the task of the security forces not only exceedingly difficult but also dangerous and risky.
>
> Any attempt to justify the conduct of the TV channels by citing the right to freedom of speech and expression would be totally wrong and unacceptable in such a situation. The freedom of expression, like all other freedoms under Article 19, is subject to reasonable restrictions. An action tending to violate another person's right to life guaranteed under Article 21 or putting the national security in jeopardy can never be justified by taking the plea of freedom of speech and expression.
>
> The shots and visuals that were shown live by the TV channels could have also been shown after all the terrorists were neutralised and the security operations were over. But, in that case the TV programmes would not have had the same shrill, scintillating and chilling effect and would not have shot up the TRP ratings of the channels. It must, therefore, be held that by covering live the terrorists attack on Mumbai in the way it was done, the Indian TV channels were not serving any national interest or social cause. On the contrary they were acting in their own commercial interests putting the national security in jeopardy….
>
> The coverage of the Mumbai terror attack by the mainstream electronic media has done much harm to the argument that any regulatory mechanism for the media must only come from within.

Except for expressing its anguish, in the above *obiter*, the court did not deal further with the matter as the issue of freedom of press was not involved.

Limits of media reporting of *sub judice* matters

The fourth pillar of democracy, the press, has the freedom of speech and expression like any citizen under article 19(1) (a) of the Constitution. This freedom

68 *Ibid.*

is subject to "reasonable restrictions" on specific grounds mentioned in clause (2) of that article. It is well settled that a court, be it subordinate judiciary, the high court or the Supreme Court, has power to issue preventive injunction directing the media, print as well as electronic, not to publish any defamatory matter which has the effect of violating the privacy or any other human right of a person or which tends to adversely affect the business/trading activities of any person or which tends to interfere with, or obstruct the, administration of justice.[69] But it is equally true that till now, the courts have not ventured to issue any general guidelines with regard to reporting of *sub judice* matters. Preventive injunctions have been issued on a case to case basis. The Supreme Court in *Sahara India Real Estate Corp. Ltd.* v. *Securities & Exchange Board of India*[70] specifically dealt with this issue without any answer to the question whether the court had power to issue any such guidelines. In the present case, the court did not issue any guidelines despite specific prayer by the appellant to do so. In this case, appeals were filed before the apex court challenging the validity of two orders passed by Securities & Exchange Board of India (SEBI) against the appellant. While considering the question of staying the impugned orders of SEBI, the Supreme Court wanted adequate satisfactory security from the appellant to secure the interest of those for whom the impugned orders had been passed. One letter and mail were exchanged between the counsel for both the parties containing the proposal for security which, according to the appellant, were leaked out by SEBI to one of the TV channels and the same was telecast. When the matter was brought to the notice of the court, the court "requested learned counsel on both sides to make written application to this Court in the form of an I.A. so that appropriate orders could be passed by this Court with regard to reporting of matters, which are sub judice."[71] It was then that the appellant moved an application for issuing "appropriate guidelines" for reporting *sub judice* matters. Thus, the application was made on the "request" of the court and not on own volition by the parties which clearly establishes as to how much anxious the court was to nail the media in reporting *sub judice* matters. This was indeed a very strange anxiety on the part of a constitution bench of the apex court to exercise power on a subject which was not at all in issue in the case. It is quite strange that the court acted like an advisor to the parties and invited application on a matter on which the parties were not serious and the issue was not the subject matter of appeal. Except for restraining itself from issuing any general guidelines/instructions to the media in this matter, the court traversed the entire gamut of law on the subject.

The court noted that the principle of open justice was not absolute. In this connection, reference was made to the decision of nine-judge bench in *Naresh*

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69 *Reliance Petrochemicals Ltd.* v. *Proprietors of Indian Express Newspapers Bombay (P) Ltd*., AIR 1989 SC 190; *Amar Singh* v. *Union of India* (2011) 7 SCC 69, 90.

70 AIR 2012 SC 3829. The apex court in *Center for PIL* v. *Union of India*, AIR 2012 SC (Supp) 128, had directed that no one including the newspapers shall interfere with the functioning of the CBI team and the officers of the Enforcement Directorate who were investigating the 2G spectrum scam and it warned that it would take "serious cognizance of any endeavour made by any person or group of persons in this regard."

71 AIR 2012 SC 3829 at 3833.

Shridhar Mirajkar v. *State of Maharashtra*,[72] in which it was held that orders prohibiting publication of evidence of the witness for a temporary period during the course of trial with a view to prevent excessive publicity was permissible in the exercise of inherent powers of the court where the court was satisfied that the interest of justice so required and such orders did not offend article 19(1)(a). Thus "prior restraint" *per se* was not constitutionally impermissible. The court also noted that presumption of innocence of an accused to be a human right.[73] Dealing with the circumstances in, and limitations subject to, which a prior restraint orders (or postponement order) could be passed, S.H. Kapadia, CJI observed:[74]

> Such an order of postponement has to be passed only when other alternative measures such as change of venue or postponement of trial are not available. In passing such orders of postponement, courts have to keep in mind the principle of proportionality and the test of necessity. The applicant who seeks order of postponement of publicity must displace the presumption of Open Justice and only in such cases the higher courts shall pass the orders of postponement under Article 129/Article 215 of the Constitution. Such orders of postponement of publicity shall be passed for a limited period and subject to the courts evaluating in each case the necessity to pass such orders not only in the context of administration of justice but also in the context of the rights of the individuals to be protected from prejudicial publicity or misinformation, in other words, where the court is satisfied that Article 21 rights of a person are offended. There is no general law for courts to postpone publicity, either prior to adjudication or during adjudication as it would depend on facts of each case. The necessity for any such order would depend on extent of prejudice, the effect on individuals involved in the case, the over-riding necessity to curb the right to report judicial proceedings conferred on the media under Article 19(1)(a) and the right of the media to challenge the order of postponement.

Dealing with the purpose of postponement order, the learned chief justice stated:[75]

> Superior Courts of Record have inter alia inherent superintendent jurisdiction to punish contempt committed in connection with proceedings before inferior courts. The test is that the publication (actual and not planned publication) must create a real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. It is important to bear in mind that sometimes even fair and accurate reporting of the trial (say murder trial) could nonetheless give rise to the "real and substantial risk of serious prejudice" to the connected trials. In such cases, though rare, there is no other practical means short of postponement orders that is capable of

72 AIR 1967 SC 1.
73 *Ranjitsing Brahmajeetsing Sharma* v. *State of Maharashtra* (2005) 5 SCC 294.
74 *Supra* note 71 at 3841-42.
75 *Id*. at 3845.

avoiding the real and substantial risk of prejudice to the connected trials. Thus, postponement orders safeguard fairness of the connected trials. The principle underlying postponement orders is that it prevents possible contempt.

The chief justice also tried to justify the postponement order as a reasonable restriction under clause (2) to article 19. He observed:[76]

(S)uch orders of postponement, in the absence of any other alternative measures such as change of venue or postponement of trial, satisfy the requirement of justification under Article 19(2) and they also help the Courts to balance conflicting societal interests of right to know vis-à-vis another societal interest in fair administration of justice. One more aspect needs to be mentioned. Excessive prejudicial publicity leading to usurpation of functions of the Court not only interferes with administration of justice which is sought to be protected under Article 19(2), it also prejudices or interferes with a particular legal proceedings. In such cases, Courts are duty bound under inherent jurisdiction, subject to above parameters, to protect the presumption of innocence which is now recognized by this Court as a human right under Article 21, subject to the applicant proving displacement of such a presumption in appropriate proceedings. Lastly, postponement orders must be integrally connected to the outcome of the proceedings including guilt or innocence of the accused, which would depend on the facts of each case. For aforesaid reasons, we hold that subject to the above parameters, postponement orders fall under Article 19(2) and they satisfy the test of reasonableness.

Indicating the remedy, the learned CJI observed:[77]

(A)nyone, be he an accused or an aggrieved person, who genuinely apprehends on the basis of the content of the publication and its effect, an infringement of his/her rights under Article 21 to a fair trial and all that it comprehends, would be entitled to approach an appropriate writ court and seek an order of postponement of the offending publication/broadcast or postponement of reporting of certain phases of the trial (including identity of the victim or the witness or the complainant), and that court may grant such preventive relief, on a balancing of the right to a fair trial and Article 19(1)(a) rights, bearing in mind the abovementioned principles of necessity and proportionately and keeping in mind that such orders of postponement should be for short duration and should be applied only in cases of real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. Such neutralizing device (balancing test) would not be an unreasonable restriction and on the contrary would fall within the proper constitutional framework.

76 *Id*. at 3846.
77 *Id.* at 3846-47.

Being conscious of the fact that the decision might invite adverse criticism on the ground of maintainability, the court stated:[78]

> In this case, this Court is only declaring under Article 141, the constitutional limitations on free speech under Article 19(1)(a), in the context of Article 21. The exercise undertaken by this Court is an exercise of exposition of constitutional limitations under Article 141 read with Article 129/Article 215 in the light of the contentions and large number of authorities referred to by the counsel on Article 19(1)(a), Article 19(2), Article 21, Article 129 and Article 215 as also the "law of contempt" insofar as interference with administration of justice under the common law as well as under Section 2(c) of 1971 Act is concerned. What constitutes an offending publication would depend on the decision of the court on case to case basis. Hence, guidelines on reporting cannot be framed across the Board. The shadow of "law of contempt" hangs over our jurisprudence. This Court is duty bound to clear that shadow under Article 141.

One cannot forget the immense contribution made by the press in the past in bringing the culprits to book, particularly in high profile cases.[79] It is true that ordinary citizens may not be able to reach a writ court for a postponement order on account of their ignorance or lack of means/resources, but the above views of the court will certainly encourage rich persons to approach the writ courts for such orders which may not be in the best interest of the administration of justice. The so-called declaration under article 141 was completely un-called for.

VIII FREEDOM TO CARRY ON TRADE AND BUSINESS

Every citizen has been guaranteed a right under article 19(1)(g) to practise any profession of his choice but this right is subject to reasonable restrictions that can be imposed by law under clause (6) in the interest of general public and the state has also power to prescribe any educational and technical qualifications for practising any profession. In *N.K. Bajpai* v. *Union of India,*[80] the question was whether section 129(6) of the Customs Act, 1962 which stipulates that on demitting office as a member of the customs, excise and service tax appellate tribunal (CESTAT) a person shall not be entitled to appear before CESTAT, was *ultra vires* article 19(6) of the Constitution of India. The petitioner in this case had worked as a member (Technical) in the customs, excise and gold (control) appellate tribunal (CEGAT) from where he retired in 1993. He was enrolled as an advocate with the state bar council after retirement. CEGAT was subsequently replaced by the customs, excise and service

78 *Id*. at 3847.

79 See, for instance, *Sidhartha Vashisht alias Manu Sharma* v. *State (NCT of Delhi)* (2010) 6 SCC 1.

80 (2012) 4 SCC 653; see also *Society for Un-Aided P. School of Rajasthan* v. *Union of India*, AIR 2012 SC 3445 [The requirement to all minority and non-minority schools to follow national and state curriculum and compulsorily admit upto 25 per cent students does not offend the freedom under art. 19(1)(g)].

tax appellate tribunal (CESTAT/the Tribunal). Section 129(6) was introduced to the Customs Act, 1962 vide the Finance Act, 2003 whereby the members of the tribunal were debarred from appearing, acting or pleading before it. Being aggrieved by the tribunal's order holding that the appellant and other persons similarly situated were not entitled to appear before it in view of the bar contained in section 129(6) of the Customs Act, the appellant approached the court contending that section 129(6) was violative of articles 14, 19(1)(g) and 21 of the Constitution. Section 30 of the Advocates Act, 1961 provides that every advocate whose name is entered in the state roll shall, as a matter of right, be entitled to practise throughout the territories to which the Act applies, in all courts and tribunals. As pointed out above, the right to practise any profession is not an absolute right; it is subject to restrictions which can be imposed by law. While upholding the validity of section 129(6), the court, relying on a number of decisions relating to other professions, observed:[81]

> For two different reasons, we are unable to hold that the restriction imposed under Section 129(6) of the Act is unreasonable or ultra vires. Firstly, it is not an absolute restriction. It is a partial restriction to the extent that the persons who have held the office of the President, Vice-President or other members of the Tribunal cannot appear, act or plead before that Tribunal. In modern times, there are so many courts and tribunals in the country and in every State, so that this restriction would hardly jeopardise the interests of any hardworking and upright advocate. The right of such advocate to practise in the High Courts, District Courts and other tribunals established by the State or the Central Government other than CESTAT remains unaffected. Thus, the field of practise is wide open, in which there is no prohibition upon the practise by a person covered under the provisions of Section 129(6) of the Customs Act. Secondly, such a restriction is intended to serve a larger public interest and to uplift the professional values and standards of advocacy in the country. In fact, it would add further to public confidence in the administration of justice by the Tribunal in discharge of its functions. Thus, it cannot be held that the restriction has been introduced without any purpose or object. In fact, one finds a clear nexus between the mischief sought to be avoided and the object aimed to be achieved.

IX RIGHT TO FREE AND COMPULSORY EDUCATION

Article 21A of the Constitution of India casts a duty on the state to provide free and compulsory education to all children of the age of six to fourteen years in accordance with law. The Right of Children to Free and Compulsory Education Act, 2009 (RTE Act) seeks to achieve that object. The Act is applicable to all educational institutions imparting elementary education to children. Section 3(1) provides that every child of the age of six to fourteen years shall have the right to free and compulsory education in a neighbourhood school till the completion of his

81 (2012) 4 SCC 653 at 669-70.

or her elementary education. The constitutional validity of this legislation was challenged before the Supreme Court on the ground that it violates the fundamental rights under articles 14, 19(1)(g), 21, 25 and 30 of the Constitution.[82] One of the basic objections against this legislation was the requirement making it compulsory for the educational institutions to admit compulsorily a maximum of 25 per cent students belonging to dis-advantaged categories in the neighbourhood. This provision was particularly objected to by minority educational institutions as well as the private un-aided educational institutions. While upholding the validity of this legislation, the majority, speaking through S.H. Kapadia, CJI, observed:[83]

> (W)e hold that the Right of Children to Free and Compulsory Education Act, 2009 is constitutionally valid and shall apply to the following:
>
> (i) a school established, owned or controlled by the appropriate Government or a local authority;
> (ii) an aided school including aided minority school(s) receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;
> (iii) a school belonging to specified category; and
> (iv) an unaided non-minority school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority.
>
> However, the said 2009 Act, and in particular Sections 12(1)(*c*) and 18(3) infringes the fundamental freedom guaranteed to *unaided minority schools* under Article 30(1) and, consequently, principle of severability, the said 2009 Act shall not apply to such schools.

X RIGHT TO PERSONAL LIBERTY

Doctrine of double jeopardy

The doctrine of double jeopardy is contained in article 20(1) of the Constitution of India which prohibits prosecution and punishment of a person for the same offence more than once. Similar prohibition is found in section 300 of Cr PC, 1973, section 26 of the General Clauses Act, 1897 and section 71 of the IPC, 1860. B.S. Chauhan, J in *Sangeetaben Mahendrabhai Patel* v. *State of Gujarat*,[84] after considering all earlier cases on the subject, summarized the necessary ingredient for the application of the doctrine thus:

> (T)he law is well settled that in order to attract the provisions of Article 20(2) of the Constitution i.e. doctrine of *autrefois acquit* or Section 300 CrPC or Section 71 IPC or Section 26 of the General Clauses Act, the ingredients of the offences in the earlier case as well as in the latter case must be the same and not different. The test to ascertain whether the two

82 *Society for Un-Aided P. School of Rajasthan* v. *Union of India*, AIR 2012 SC 3445.
83 *Id*. at 3467.
84 AIR 2012 SC 2844 at 2852.

> offences are the same is not the identity of the allegations but the identity of the ingredients of the offence. Motive for committing the offence cannot be termed as the ingredients of offences to determine the issue. The plea of *autrefois acquit* is not proved unless it is shown that the judgment of acquittal in the previous charge necessarily involves an acquittal of the latter charge.

In this case, the appellant was tried and acquitted for having committed the offence under section 138 of the Negotiable Instruments Act, 1881(NI Act) as the cheque issued by him had bounced and the challenge to the acquittal was pending before the high court. In the meanwhile, the respondent had filed another complaint against the appellant under section 406/420 of the IPC, 1860. The appellant approached the court for quashing the latter complaint. Chauhan, J noted that there might be some overlapping of facts in both the complaints but the offences under the two provisions were entirely different and, therefore, the doctrine of double jeopardy was not applicable. The learned judge held:[85]

> Admittedly, the appellant had been tried earlier for the offences punishable under the provisions of Section 138 of the NI Act and the case is sub judice before the High Court. In the instant case, he is involved under Sections 406/420 read with Section 114 IPC. In the prosecution under Section 138 of the NI Act, the mens rea i.e. fraudulent or dishonest intention at the time of issuance of cheque is not required to be proved. However, in the case under IPC involved herein, the issue of mens rea may be relevant. The offence punishable under Section 420 IPC is a serious one as the sentence of 7 years can be imposed. In the case under the NI Act, there is a legal presumption that the cheque had been issued for discharging the antecedent liability and that presumption can be rebutted only by the person who draws the cheque. Such a requirement is not there in the offences under IPC. In the case under the NI Act, if a fine is imposed, it is to be adjusted to meet the legally enforceable liability. There cannot be such a requirement in the offences under IPC. The case under the NI Act can only be initiated by filing a complaint. However, in a case under IPC such a condition is not necessary.

It would be useful to point out that Chauhan J, after referring but without distinguishing the decision in *Kolla Veera Raghav Rao* v. *Gorantla Venkateswara Rao*,[86] struck an entirely different note. In that case, a two-judge bench of the apex court headed by Markandey Katju J had clearly held that although the offences involved in that case (section 138 of NI Act and section 420 of IPC) were different but the *facts* were the same and section 300(1) Cr PC barred the subsequent prosecution. Katju J in that case did not look into the *ingredients* of offences involved in both the cases while Chauhan J in the present case looked into the *ingredients* of offences involved in both the cases and not the *facts* even though the same were

85 *Id*. at 2853-54.

86 AIR 2011 SC 641.

identical. In the present case also, the facts as well as the offences were the same. How can then the decision be different? Both the decisions were given by two-judges bench. The issue needs to be clarified by a larger bench on account of conflict of opinion.

Right to bail and fair trial

The right to bail is the general rule while committal to jail is an exception. In *State of U.P*. v. *Amarmani Tripathi*,[87] the Supreme Court had held that the matters to be considered in an application for bail were: (i) Whether there was any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) Nature and gravity of the charge; (iii) Severity of the punishment in the event of conviction; (iv) Danger of the accused absconding or fleeing, if released on bail; (v) Character, behaviour, means, position and standing of the accused; (vi) Likelihood of the offence being repeated; (vii) Reasonable apprehension of the witnesses being tampered with; and (viii) Danger of justice being thwarted by grant of bail. In *Kalyan Chandra Sarkar* v. *Rajesh Ranjan*,[88] the Supreme Court further held that a court considering an application for grant of bail should also consider, among other circumstances, these factors: (a) Nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence; (b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.; and (c) Prima facie satisfaction of the court in support of the charge. In *Sanjay Chandra* v. *Central Bureau of Investigation*,[89] the apex court pointed out that the object of bail was to secure the appearance of the accused at the trial; its object was neither punitive nor preventive. The refusal of bail was a restriction on personal liberty of the individual guaranteed under article 21 of the Constitution and it was not in the interest of justice to keep an under-trial accused in jail for an indefinite period of time during the trial which may take considerable time. The bail cannot be denied simply because of public sentiments against the accused. H.L. Dattu, J observed:[90]

> The grant or refusal to grant bail lies within the discretion of the Court. The grant or denial is regulated to a large extent, by the facts and circumstances of each particular case. The primary purpose of bail in a criminal case are to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance thereon whenever his presence is required….
>
> When the under-trial prisoners are detained in jail custody to an indefinite period, Article 21 of the Constitution is violated. Every person, detained or arrested, is entitled to speedy trial.

87 (2005) 8 SCC 21; also see *Prahlad Singh Bhati* v. *NCT, Delhi*, AIR 2001 SC 1444 and *Gurcharan Singh* v. *State* (*Delhi Admn*.), AIR 1978 SC 179.

88 AIR 2004 SC 1866.

89 AIR 2012 SC 830. Four top lawyers of country represented the accused-appellants – Ram Jethmalani, Mukul Rohatgi, Soli J. Sorabji and Ashok H. Desai.

90 *Id*. at 845.

In the present case, the court noted that the charges against 17 accused persons related to economic offences of cheating and dishonestly inducing delivery of property, forgery for the purpose of cheating using as genuine a forged document for which punishment could be upto seven years of imprisonment. The trial court and high court had refused bail to the accused on the grounds that the offences alleged against the accused were very serious involving deep rooted planning in which, huge financial loss was caused to the public exchequer (2G spectrum allocation) and there was a possibility of the accused persons tampering with the witnesses. The apex court noted that there were 17 accused persons; the statements of witnesses ran into several hundred pages and the documents relied upon were voluminous. In the light of these facts, while enlarging the accused on bail on certain conditions of usual nature, Dattu, J observed: [91]

> The trial may take considerable time and it looks to us that the appellants, who are in jail, have to remain in jail longer than the period of detention, had they been convicted. It is not in the interest of justice that accused should be in jail for an indefinite period. No doubt, the offence alleged against the appellants is a serious one in terms of alleged huge loss to the State Exchequer, that, by itself, should not deter us from enlarging the appellants on bail when there is no serious contention of the respondent that the accused, if released on bail, would interfere with the trial or tamper with evidence. We do not see any good reason to detain the accused in custody, that too, after the completion of the investigation and filing of the charge-sheet.

The above view of the court raises certain basic questions. On what basis the court came to the conclusion that there was no possibility of the accused tampering with evidence or interfering with trial when that was the basis on which both the trial court as well as the high court had refused bail to the accused. Was not this issue seriously argued before the court as the above observation clearly indicates ("there was no serious contention")? Did the respondent's counsel connive with the accused in not seriously canvassing this issue? How can the court assume, as it did, that the accused may have to be in jail for a period longer than the maximum period prescribed for the alleged offences? This kind of assumption is clearly unfounded. It is difficult to notice any other parallel case of this type in which the court might have made this kind of conjecture and expressed a pessimistic note about delay in the trial of a criminal case and on that basis given bail to the accused persons. If, after completing the investigation and submitting the charge-sheet, the accused are to be given bail, as in the present case, let this be a precedent for all other criminal cases. Unfortunately, this is not happening. A large number of persons are languishing in jail for a long time even though charge-sheet had been submitted after investigation and there is hardly any chance either to tamper with evidence or influence the witnesses.

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91 *Id*. at 845-46.

Biased decision is against fair trial under art. 21

It is rather a strange situation when a judge (S.N. Dhingra) recuses himself from trying a criminal case "for personal reason" when the same came before him at the trial stage while the same very judge, having been elevated to the high court in the meantime, hears the case in revision. It is unthinkable that a judge recusing himself for "personal reason" will forget the accused on account of lapse of some time and later try the case. The Supreme Court set aside the decision of the judge as the same was considered to be biased and in violation of the right to fair trial under article 21.[92] The FIR in the case was registered in November, 1988, Mr. S.N. Dhingra (as ADJ) had recused in September, 2000, the accused were acquitted by the additional sessions judge in March, 2003, S.N. Dhingra J (as a high court judge) dismissed the revision petition in September, 2010 and Supreme Court set aside his judgment in December, 2011 and remanded the case for fresh disposal. The case was pending before the high court till the end of the year 2012. It is very unfortunate that a judge decided a case in this manner which resulted in wastage of many years of time of the accused and the state, besides putting them to great financial loss.

Right to speedy trial

The right to life and personal liberty under articles 21 and 22 includes right to speedy investigation[93] as well as trial. In *Imtiaz Ahmad*,[94] the Supreme Court was distressed to note that a large number of criminal cases were pending before different high courts for the last many years after the high courts had granted stay in investigations, framing of charges and trial of cases. Emphasizing the necessity of speedy justice in criminal cases, Asok Kumar Ganguly J observed:[95]

> (T)he exercise of this authority (to order stay of investigation or trial) carries with it the responsibility to expeditiously dispose of the case. The power to grant stay of investigation or trial is a very extraordinary power given to High Courts and the same power is to be exercised sparingly only to prevent an abuse of the process and to promote the ends of justice. It is therefore clear that:
> (i) Such extraordinary power has to be exercised with due caution and circumspection.
> (ii) Once such power is exercised, the High Court should not lose sight of the case where it has exercised its extraordinary power of staying investigation and trial.
> (iii) High Court should make it a point of finally disposing of such proceedings as early as possible but preferably within six months from the date the stay order is issued.

92 *Narinder Singh Arora* v. *State* (*NCT of Delhi*), AIR 2012 SC 1642.
93 See *Vakil Prasad Singh* v. *State of Bihar*, AIR 2009 SC 1822; S.N. Singh, "Constitutional Law – I (Fundamental Rights)", LXV *ASIL* 125 at 140 (2009).
94 *Imtiyaz Ahmad* v. *State of U.P.*, AIR 2012 SC 642.
95 *Id.* at 654.

To justify the above guidelines, the learned judge noted the relationship between the high court and the Supreme Court thus:[96]

> It is true that this Court has no power of superintendence over High Court as the High Court has over District Courts under Article 227 of the Constitution. Like this Court, High Court is equally a Superior Court of record with plenary jurisdiction. Under our Constitution High Court is not a Court subordinate to this Court. This Court, however, enjoys appellate powers over High Court as also some other incidental powers. But as the last court and in exercise of this Court's power to do complete justice which includes within it the power to improve the administration of justice in public interest, this Court gives the aforesaid guidelines for sustaining common man's faith in the rule of law and the justice delivery system, both being inextricably linked.

The court also issued certain directions to the 19th Law Commission to investigate and report to the court within six months of the date of the order (01.02.2012) about various measures that can be taken for expeditious disposal of cases and reduction of arrears of pending cases. Till the end of the year, the Law Commission had not submitted any report to the court as requested.

When a person is deprived of his right to speedy trial, he is not entitled as a matter of course to get the trial quashed since it is a fundamental rule that a crime never dies. A five-judge bench of the Supreme Court in *A.R. Antulay* v. *R.S. Nayak*,[97] had laid down eleven 11 guidelines, though not exhaustive, to deal with issues pertaining to the speedy trial and consequences for delay. The trial proceedings may be quashed exceptionally in the entirety of the facts and circumstances of the case.[98] In *Mohd. Hussain* v. *State* (*Govt. of NCT of Delhi*),[99] the appellant-accused, a national from Pakistan, was convicted for his role in a bomb explosion that had occurred in 1997 in a city bus in Delhi and awarded death sentence by the session court which had been confirmed by the high court under several provisions of the IPC, 1860 and the Explosive Substances Act, 1908. The division bench unanimously held that the conviction was vitiated on account of infirmity of not providing legal assistance to the accused during trial. But there was a divergence of opinion among

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96 *Ibid.*; also see to the same effect, the views expressed by R.C. Lahoti J in *Tirupati Balaji Developers (P) Ltd.* v. *State of Bihar* (2004) 5 SCC 1; S.N. Singh, "Constitutional Law – II (Provisions other than Fundamental Rights)", XL *ASIL* 107, 110-12 (2004).

97 AIR 1992 SC 1701 : (1992) 1 SCC 225; also see *Kartar Singh* v. *State of Punjab* (1994) 3 SCC 569 and *P. Ramchandra Rao* v. *State of Karnataka*, AIR 2002 SC 1856 (seven-judges bench) [re-affirming the guidelines laid down in *Antulay* while, at the same time, holding that the time-limits or bars of limitation prescribed in many cases (*Common Cause (I)* v. *Union of India*, AIR 1996 SC 1619 (two-judges bench), *Deo Raj Sharma (I)* v. *State of Bihar*, AIR 1998 SC 3281 (three-judges bench) and *Deo Raj Sharma (II)* v. *State of Bihar*, AIR 1999 SC 3524 (three-judge bench) were not good law].

98 *Vakil Prasad Singh* v. *State of Bihar*, AIR 2009 SC 1822; see S N Singh, "Constitutional Law – I (Fundamental Rights)", XLV *ASIL* 125 at 140 (2009).

99 AIR 2012 SC 750 : (2012) 2 SCC 584.

the two judges as to whether the case be remanded for re-trial after providing counsel to the appellant as long time had elapsed during the trial. While H.L. Dattu, J held that the case be remanded for re-trial as mere delay in trial was not sufficient to bar re-trial, C.K. Prasad, J, on the other hand, held that since there was considerable delay in the trial (the incident of bomb explosion in a city bus related to the year 1997 and the accused foreign national was in jail since 1998), the accused be deported to Pakistan. On account of this divergence of opinion, the matter was placed before the full bench of three-judges. Accepting the views of H.L. Dattu, J, the full bench, speaking through R.M. Lodha, J, observed: [100]

> "Speedy trial" and "fair trial" to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of the accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered.

In *Ranjan Dwivedi* v. *C.B.I., Through the Director General*,[101] the appellant-accused was charged for assassination of the then union railway minister, L.N. Mishra in January, 1975. His petition for quashing the trial on the ground of delay had been dismissed by the apex court in 1991 which had directed the trial court to expeditiously conclude the trial which was continuing even till 2012. While dealing with the object of speedy trial, H.L. Dattu, J observed:[102]

> The guarantee of a speedy trial is intended to avoid oppression and prevent delay by imposing on the court and the prosecution an obligation

100 (2012) 9 SCC 408 : AIR 2012 SC 3860 at 3873.

101 AIR 2012 SC 3217; also see *Shyam Babu* v. *State of U.P.*, AIR 2012 SC 3311 (The accused cannot be exonerated merely because there was a delay of 25 years in the disposal of his appeal)..

102 AIR 2012 SC 3217 at 3227.

> to proceed with the trial with a reasonable dispatch. The guarantee serves a threefold purpose. Firstly, it protects the accused against oppressive pre-trial imprisonment; secondly, it relieves the accused of the anxiety and public suspicion due to unresolved criminal charges and lastly, it protects against the risk that evidence will be lost or memories dimmed by the passage of time, thus, impairing the ability of the accused to defend him or herself. Stated another way, the purpose of both the criminal procedure rules governing speedy trials and the constitutional provisions, in particular, Article 21, is to relieve an accused of the anxiety associated with a suspended prosecution and provide reasonably prompt administration of justice.
>
> The reasons for the delay is one of the factors which the courts would normally assess in determining as to whether a particular accused has been deprived of his or her right to speedy trial, including the party to whom the delay is attributable. Delay, which is occasioned by action or inaction of the prosecution, is one of the main factors which will be taken note of by the courts while interjecting a criminal trial. A deliberate attempt to delay the trial, in order to hamper the accused, is weighed heavily against the prosecution. However, unintentional and unavoidable delays or administrative factors over which the prosecution has no control, such as, overcrowded court dockets, absence of the presiding officers, strike by the lawyers, delay by the superior forum in notifying the designated judge (in the present case only), the matter pending before the other forums, including the high court's and the Supreme Court and adjournment of the criminal trial at the instance of the accused, may be a good cause for the failure to complete the trial within a reasonable time. This is only illustrative and not exhaustive. Such delay or delays cannot be violative of the accused's right to a speedy trial and needs to be excluded while deciding whether there is unreasonable and unexplained delay. The good cause exception to the speedy trial requirement focuses on only one factor *i.e.,* the reason for the delay and the attending circumstances bear on the inquiry only to the extent to the sufficiency of the reason itself.

The accused-petitioner filed another writ petition under article 32 for quashing the trial on the ground of inordinate delay. The court noted that between 1991 and 2012, the prosecution had sought only 4-5 adjournments on justified grounds and the delay in the trial was solely attributable to the petitioner and other co-accused persons. Dismissing the writ petition, Dattu, J observed:[103]

> When the accused makes a prima facie showing of prejudice, the burden shifts on the prosecution to show that the accused suffered no serious prejudice. The question of how great a lapse it is, consistent with the guarantee of a speedy trial, will depend on the facts and circumstances of each case. There is no basis for holding that the right to speedy trial can be

103 *Id.* at 3227-28.

> quantified into specified number of days, months or years. The mere passage of time is not sufficient to establish denial of a right to a speedy trial, but a lengthy delay, which is presumptively prejudicial, triggers the examination of other factors to determine whether the rights have been violated….
>
> In our considered view, the delay tolerated varies with the complexity of the case, the manner of proof as well as the gravity of the alleged crime. This, again, depends on case-to-case basis. There cannot be universal rule in this regard. It is a balancing process while determining as to whether the accused's right to speedy trial has been violated or not. The length of delay in and itself, is not a weighty factor.…
>
> Prescribing a time-limit for the trial court to terminate the proceedings or, at the end thereof, to acquit or discharge the accused in all cases will amount to legislation, which cannot be done by judicial directives within the arena of judicial law-making power available to the constitutional courts; however, liberally the courts may interpret articles 21, 32, 141 and 142.

Improper investigation violates art. 21

Fair investigation is a part of right to life and personal liberty under article 21 of the Constitution. The Supreme Court took a very serious view of dereliction of duty on the part of the investigating officers in not doing their job properly while investigating a criminal case. In *Dayal Singh* v. *State of Uttaranchal*,[104] the Supreme Court noted that in a case of pre-meditated murder, "the deceased's viscera, allegedly handed over by the doctor to the police, was either never sent to the forensic science laboratory (FSL) for chemical examination, or if sent, the report thereof was neither called for nor proved before the court." Everything was left to the imagination of the trial court. The doctor, who had conducted the post-mortem of the body, had stated that "he did not find any ante-mortem or post-mortem injuries on the dead body." But two eye-witnesses produced by the prosecution (son and wife of the deceased) had narrated as to how the accused killed the man with blows given by lathis because of which the man died on the spot. The court wondered as to how then the man died when the doctor had stated that there were no ante-mortem or post-mortem injuries on the body of the deceased? Despite shady investigation and medical report, the accused persons were convicted by the court. Swatantar Kumar, J pointed out that the investigating officer and the doctor dealing with the case were required to act according to the police manual and the doctor knew the canons of medical jurisprudence; they were obliged to be truthful, diligent and fair in their approach. The court found them guilty of dereliction of duty and directed the state to take disciplinary action against the guilty persons and report the same to the court. This decision would go a long way in deterring the investigating officers and doctors in making half-hearted investigation and medical examination for personal or any other extraneous consideration.

Right to legal representation

An accused has a fundamental right under articles 21 and 22(1) of the Constitution to a fair trial and a trial would not be considered to be fair if the

104 AIR 2012 SC 3046.

accused was not provided the services of a counsel during the trial[105] or at the appellate stage. Under section 304 of the Cr PC, where in a trial before a court of session, the accused is not represented by a pleader and where it appears to the court that the accused has no sufficient means to engage a pleader, the court shall assign a pleader for his defence at the expense of the state. The trial of an accused in the absence of a counsel is not valid.[106] The ignorance of the judges and lawyers about this cardinal principle is well reflected in *Mohd. Hussain* v. *State (Govt. of NCT), Delhi*,[107] A perusal of the trial court proceedings in this case indicated that the evidence of 56 out of 65 witnesses including the eye-witness and the investigating officer were recorded without any cross-examination and in the absence of a counsel for the appellant. The evidence of the remaining nine witnesses were recorded in the presence of a freshly appointed counsel for the appellant who, at the far end of the trial, casually cross-examined only one witness. The division bench of the apex court held that the conviction of the appellant-accused was vitiated on account of the fact that the appellant was not provided the assistance of a counsel in a substantial and meaningful sense and, therefore, the conviction was set aside. But there being a divergence of opinion among the two judges regarding the re-trial of the accused, the matter was referred to a full-bench of the court. The full bench of the court, speaking through R.M. Lodha, J, held:[108]

> It cannot be ignored that the offences with which the appellant has been charged are of very serious nature and if the prosecution succeeds and the appellant is convicted under Section 302 IPC on retrial, the sentence could be death or life imprisonment. Section 302 IPC authorises the court to punish the offender of murder with death or life imprisonment. Gravity of the offences and the criminality with which the appellant is charged are important factors that need to be kept in mind, though it is a fact that in the first instance the accused has been denied due process. While having due consideration to the appellant's right, the nature of the offence and its gravity, the impact of crime on the society, more particularly the crime that has shaken the public and resulted in death of four persons in a public transport bus cannot be ignored and overlooked. It is desirable that punishment should follow offence as closely as possible. In an extremely serious criminal case of the exceptional nature like the present one, it would occasion in failure of justice if the prosecution is not taken to the logical conclusion. Justice is supreme. The retrial of the appellant, in our opinion,

105 *Hussainara Khatoon (4)* v. *State of Bihar* (1980) 1 SCC 98 (P.N. Bhagwati and D.A. Desai, JJ); *Khatri (2)* v. *State of Bihar* (1981) 1 SCC 627 (P.N. Bhagwati and A.P. Sen, JJ); *Suk Das* v. *UT of Arunachal Pradesh* (1986) 2 SCC 401 (P.N. Bhagwati, C.J. and D.P. Madon & G.L. Oza, JJ).

106 *Mohd. Sukur Ali* v. *State of Assam*, AIR 2011 SC 1222 : (2011) 4 SCC 729 : 2011 Cri LJ 1690; *A.S. Mohammed Rafi* v. *State of T.N.*, AIR 2011 SC 308 : (2011) 4 SCC 688; also see S.N. Singh, "Constitutional Law – I (Fundamental Rights)", XVII *ASIL* 171 at 202 (2011).

107 AIR 2012 SC 750; also see *Ashish Chadha* v. *Asha Kumari*, AIR 2012 SC 431.

108 AIR 2012 SC 3860 at 3874.

> in the facts and circumstances, is indispensable. It is imperative that justice is secured after providing the appellant with the legal practitioner if he does not engage a lawyer of his choice.

Likewise, the apex court disposed of the appeal by setting aside the judgment and order passed by the High Court of Madhya Pradesh at Jabalpur on the ground that the appellant (Rajoo) was not represented through a counsel in the high court and remitted the case back to the high court for a fresh hearing after providing legal aid to the appellant with a request to the high court to expedite hearing of the appeal.[109] It needs to be noted that in the present case, Madan B. Lokur J (with A.K. Patnaik, J) went one step further in expressing a doubt about the correctness of certain observations made by the division bench in *Khatri II* [110] and the full bench in *Suk Das*[111] in the following words:[112]

> We propose to briefly digress and advert to certain observations made, both in *Khatri (2)* and *Suk Das*. In both cases, this Court carved out some exceptions in respect of grant of free legal aid to an accused person. It was observed that: there "may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services need not be provided by the State." We have some reservations whether such exceptions can be carved out particularly keeping in mind the constitutional mandate and the universally accepted principle that a person is presumed innocent until proven guilty. If such exceptions are accepted, there may be a tendency to add some more, such as in cases of terrorism, thereby diluting the constitutional mandate and the fundamental right guaranteed under Article 21 of the Constitution.

The above observation raises certain basic questions of legality and propriety. When the issue was not raised in the case before the court, why did the court choose to make unwarranted observations? Moreover, was it not improper for a division bench to unnecessarily express reservations about the views taken by a full bench? What purpose was served by expressing reservations is not at all clear. It would be better if the smaller benches of the court do not make such un-wanted observations on the views expressed by the larger benches and that too when the issue was not before the court.

The accused has a right to be represented through a counsel of his choice but this right does not extend during the course of investigation. In *Mohammed Ajmal*

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109 *Rajoo @ Ramakant* v. *State of M.P.*, AIR 2012 SC 3034 : (2012) 8 SCC 553. It may be noted that the right of the accused to engage a legal practitioner at the state expense for defence cannot be enforced by a writ petition under art. 32 of the Constitution: *Ranjan Dwivedi* v. *Union of India* (1983) 3 SCC 307.

110 *Khatri II* v. State of Bihar (1981) 1 SCC 627 (P.N. Bhagwati and A.P. Sen, JJ).

111 *Suk Das* v. *Union Territory of Arunachal Pradesh* (1986) 2 SCC 401 (P.N. Bhagwati CJ and D.P. Madon & G.L. Oza, JJ).

112 *Supra* note 109 at 3037.

Mohammad Amir Kasab v. *State of Maharashtra*,[113] when the accused-appellant was produced before the magistrate for recording his confessional statement under section 164 of the Cr PC, the magistrate satisfied herself that the confession was being made voluntarily; no police was allowed to be present; the accused was told that the confessional statement may be used against him but he was firm in making the statement as he wanted "to make the confession to set an example for others to become Fidayeen like him and follow him in his deeds"; the accused had no regrets for what he had done during the course of terrorists attack in Bombay on 26 November 2008; that the accused was fully aware of the consequences of his statement; the accused refused to take the assistance of a counsel while making his statement. The Supreme Court held that the absence of a counsel at the time of making confessional statement did not violate the rights under articles 20(3) and 22(1) of the Constitution. Aftab Alam J buttressed his point thus:[114]

> We, therefore, have no hesitation in holding that the right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a Magistrate. We, accordingly, hold that it is the duty and obligation of the Magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the Magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the Magistrate concerned liable to departmental proceedings.
>
> It needs to be clarified here that the right to consult and be defended by a legal practitioner is not to be construed as sanctioning or permitting the presence of a lawyer during police interrogation. According to our system of law, the role of a lawyer is mainly focused on court proceedings. The accused would need a lawyer to resist remand to police or judicial custody and for granting of bail; to clearly explain to him the legal consequences in case he intended to make a confessional statement in terms of section 164 Cr PC; to represent him when the court examines the charge-sheet submitted by the police and decides upon the future course of proceedings and at the stage of the framing of charges; and beyond that, of course, for the trial. It is thus to be seen that the right to access to a lawyer in this country is not based on the *Miranda [Miranda* v. *Arizona,* 384 US 436 (1966)] principles, as protection against self-incrimination, for which there are more than adequate safeguards in Indian laws. The right to access to a lawyer is for very Indian reasons; it flows from the provisions of the

113 AIR 2012 SC 3565.
114 *Id*. at 3681-82.

Constitution and the statutes, and is only intended to ensure that those provisions are faithfully adhered to in practice.

Aftab Alam J further held:[115]

> Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to represent him during the entire course of the trial. Even if the accused does not ask for a lawyer or he remains silent, it is the constitutional duty of the court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes an informed decision and tells the court, in clear and unambiguous words, that he does not want the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused….
>
> But the failure to provide a lawyer to the accused at the pre-trial stage may not have the same consequence of vitiating the trial. It may have other consequences like making the delinquent magistrate liable to disciplinary proceedings, or giving the accused a right to claim compensation against the state for failing to provide him legal aid. But it would not vitiate the trial unless it is shown that failure to provide legal assistance at the pre-trial stage had resulted in some material prejudice to the accused in the course of the trial. That would have to be judged on the facts of each case.

The court found that the accused was being provided with counsel but he refused as he did not have faith in Indian lawyers and he wanted a lawyer only from his country, Pakistan. As Pakistan denied that the accused was a Pakistani national and did not provide any lawyer to defend the accused, the court held the confession made by the accused to be his independent decision. He was throughout offered the services of the lawyer but he had refused the same. But when the accused asked for a lawyer during the course of the trial proceedings, he was immediately provided with a set of two lawyers. In view of these facts and circumstances of the case, the court did not find any violation of the right of the accused.

XI PREVENTIVE DETENTION

Challenging a detention order at pre-execution stage

There is almost unanimity in the decisions that a preventive detention order could be challenged even before the same has been executed. The justification is simple. If the order is illegal, why should a person be compelled to go to jail? The divergence of opinion, however, is as to the grounds on which the order can be challenged. In *Addl. Secretary to the Government of India* v. *Smt. Alka Subhash Gadia*,[116] the court had indicated five grounds to challenge the order at pre-execution

115 *Ibid*.
116 1992 (Supp) 1 SCC 496.

stage. In *Deepak Bajaj* v. *State of Maharashtra*,[117] Markandey Katju, J held that the five grounds indicated in *Alka Subhash Gadia* were not exhaustive. The same question once again came up for consideration in *Subhash Popatlal Dave* v. *Union of India*,[118] in which a three-judges bench of the apex court headed by Altamas Kabir J refused to read into the *Alka Subhash Gadia* case any intention on the part of the judges deciding that case that the challenge to the detention order at the pre-execution stage was to be confined only to the *five* grounds indicated therein and not on any other ground. Moreover, the powers of judicially reviewing executive actions conferred on the high courts under article 226 and on the Supreme Court under article 32 of the Constitution could not be restricted by judicial decisions. The court, therefore, directed the matter to be listed before another bench to be constituted later. This view of the court that the powers of judicial review of the executive actions conferred on the high courts and the Supreme Court could not be restricted by judicial decisions has dangerous implications. If this is the law, then there can be no judicial precedents. While deciding a case, the court need not consider previous decisions while exercising powers of judicial review. The observation of the court is too sweeping and not correct.

Constitutional validity of section 3(1) of COFEPOSA

In *Attorney General for India* v. *Amratlal Prajivandas*,[119] a nine-judge bench of the Supreme Court had upheld the constitutional validity of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA). The validity of the Act was considered by the court in that case, *inter alia*, with reference to legislative competence of Parliament to enact it. In *Dropti Devi* v. *Union of India*,[120] however, the constitutional validity of section 3(1)[121] of the Act was particularly challenged thus: The preventive detention for an 'act' was not

117 AIR 2009 SC 628; see S.N. Singh, "Constitutional Law – I (Fundamental Rights)", XLV *ASIL* 125 at 140 (2009).

118 AIR 2012 SC 3370.

119 (1994) 4 SCC 54.

120 AIR 2012 SC 2550.

121 S. 3(1) confers power to make orders for detaining certain persons. It reads thus: The Central Government or the State Government or any officer of the Central Government, not below the rank of Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from—

(i) smuggling goods, or

(ii) abetting the smuggling of goods, or

(iii) engaging in transporting or concealing or keeping smuggled goods, or

(iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or

(v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods, it is necessary so to do, make an order directing that such person be detained.

contemplated under the Constitution unless the said 'act' provided for punitive detention i.e. arrest and prosecution. As a matter of fact, there are three other central legislations relating to preventive detention (the National Security Act, 1980, the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 and the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1974) in which, alongwith preventive detention, penal provisions have also been made simultaneously for prosecution of the offenders. No penal provision exists under the COFEPOSA. Further, the Foreign Exchange Regulation Act, 1973 (FERA) contained provisions for prosecution and punishment for prejudicial activities relating to foreign exchange but the same was repealed by the Foreign Exchange Management Act, 1999 (FEMA). As long as FERA was in force, section 3(1) of COFEPOSA would have been valid but not after its repeal by FEMA which does not contain penal provisions. While comparing the two legislations, R.M. Lodha, J held that the restrictions on the dealings in foreign exchange under the FEMA continue to be as rigorous as they were under FERA and government's control over foreign exchange continues to be as complete and full as it was under FERA. Upholding the constitutional validity of section 3(1) of COFEPOSA, Lodha J observed:[122]

> On the touchstone of constitutional jurisprudence, as reflected by Article 22 read with Articles 14, 19 and 21, we do not think that the impugned provision is rendered unconstitutional. There is no constitutional mandate that preventive detention cannot exist for an act where such act is not a criminal offence and does not provide for punishment. An act may not be declared as an offence under law but still for such an act, which is an illegal activity, the law can provide for preventive detention if such act is prejudicial to State security. After all, the essential concept of preventive detention is not to punish a person for what he has done but to prevent him from doing an illegal activity prejudicial to the security of State. Strictly speaking, preventive detention is not regulation (many people call it that way), it is something much more serious as it takes away the liberty of a person but it is accepted as a necessary evil to prevent danger to the community. The law of preventive detention arms the State with precautionary action and must be seen as such. Of course, the safeguards that the Constitution and preventive detention laws provide must be strictly insisted upon whenever the court is called upon to examine the legality and validity of an order of preventive detention.

Validity of passing detention order against a person already in jail

Can a preventive detention order be passed against a person who is already in jail? In the last year's survey,[123] it was pointed that judgment of a five-judge bench[124] on the point was not noticed by smaller benches of the Supreme Court resulting in

122 *Supra* note 120 at 2571.

123 S N Singh, "Constitutional Law – I (Fundamental Rights)", XLVII *ASIL* 171 at 206 (2011).

124 *Haradhan Saha* v. *State of W.B*. (1975) 3 SCC 198.

conflicting opinions. At the same time, a three-judge bench, even after noticing this judgment, tried to dilute its *ratio* by giving an enlarged interpretation to the views expressed therein.[125] In *Haradhan Saha* v. *State of W.B*., the constitution bench had summarised the principles on the subject thus:[126]

> First, merely because a detenu is liable to be tried in a criminal court for the commission of a criminal offence or to be proceeded against for preventing him from committing offences dealt with in Chapter VIII of the Code of Criminal Procedure would not by itself debar the Government from taking action for his detention under the Act. Second, the fact that the Police arrests a person and later on enlarges him on bail and initiates steps to prosecute him under the Code of Criminal Procedure and even lodges a first information report may be no bar against the District Magistrate issuing an order under the preventive detention. Third, where the concerned person is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardise the security of the State or the public order. Fourth, the mere circumstance that a detention order is passed during the pendency of the prosecution will not violate the order. Fifth, the order of detention is a precautionary measure. It is based on a reasonable prognosis of the future behaviour of a person based on his past conduct in the light of the surrounding circumstances.

In *Suraj Pal Sahu* v. *State of Maharashtra*,[127] the court further held:

> (B)ut where the offences in respect of which the detenu is accused are so interlinked and continuous in character and are of such nature that these affect continuous maintenance of essential supplies and thereby jeopardize the security of the State, then subject to other conditions being fulfilled, a man being in detention would not detract from the order being passed for preventive detention.

In this regard, in *Vijay Kumar* v. *Union of India,*[128] it was held that two facts must appear from the grounds of detention, namely: (1) awareness of the detaining authority of the fact that the detenu is already in detention, and (2) there must be compelling reasons justifying such detention, despite fact that the detenu is already under detention. Referring to *Suraj Pal Sahu*,[129] Shetty, J, in his concurring judgment, had posed the question: What should be the compelling reason justifying the preventive detention, if the person is already in jail and where should one find it? He rejected the contention that it could be found from material other than the grounds

125 *Rekha* v. *State of T.N*. (2011) 5 SCC 244.
126 *Supra* note 124 at 209.
127 (1986) 4 SCC 378 at 391.
128 (1988) 2 SCC 57.
129 *Supra* note 127.

of detention and the connected facts therein and had held that apart from the grounds of detention and the connected facts, there cannot be any other material which can enter into the satisfaction of the detaining authority. If the activities of the detenu were not isolated or casual and were continuous or part of the transaction or racket, then, there may be need to put the person under preventive detention, notwithstanding the fact that he was under custody in connection with a case.

After quoting the above decisions, the Supreme Court in *Dharmendra Suganchand Chelawat* v. *Union of India,*[130] held that:

> (A)n order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenu is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (*a*) the detenu is likely to be released from custody in the near future, and (*b*) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities.

Thus, the law does not prevent the detaining authority from passing a detention order against a person already in custody but the detention order cannot be passed in a mechanical manner. Two cases reported during the year related to detention orders passed under the National Security Act, 1980 (NSA) and in both of them the impugned orders were quashed by the apex court. In *Huidrom Konungjao Singh* v. *State of Manipur*,[131] the court summarised the law on the point thus:

> (T)here is no prohibition in law to pass the detention order in respect of a person who is already in custody in respect of criminal case. However, if the detention order is challenged the detaining authority has to satisfy the Court the following facts:
>
> (1) The authority was fully aware of the fact that the detenu was actually in custody.
>
> (2) There was reliable material before the said authority on the basis of which it could have reasons to believe that there was real possibility of his release on bail and further on being released he would probably indulge in activities which are prejudicial to public order.
>
> (3) In view of the above, the authority felt it necessary to prevent him from indulging in such activities and therefore, detention order was necessary.
>
> In case either of these facts does not exist the detention order would stand vitiated.

130 (1990) 1 SCC 746 at 753.

131 AIR 2012 SC 2002 at 2005.

Applying the above principles to the facts of the present case, a two-judge bench of the apex court, while quashing the detention order passed against the appellant under the NSA, held:[132]

> In the instant case, admittedly, the said bail orders do not relate to the co-accused in the same case. The accused released in those cases on bail had no concern with the present case. Merely, because somebody else in similar cases had been granted bail, there could be no presumption that in the instant case had the detenu applied for bail could have been released on bail. Thus, as the detenu in the instant case has not moved the bail application and no other co-accused, if any, had been enlarged on bail, resorting to the provisions of the Act was not permissible. Therefore, the impugned order of detention is based on mere ipse dixit statement in the grounds of detention and cannot be sustained in the eye of the law.

In *Yumman Ongbi Lembi Leima* v. *State of Manipur*,[133] a three-judge bench of court had quashed the preventive detention order passed against the appellant's husband under the NSA as the impugned order was passed merely on the ground that there was "every likelihood" of the appellant's husband being released on bail in connection with the cases in which he had been arrested. The court noted that the detaining authority acted rather casually in passing the impugned order of detention.

If a person is in custody and there is no imminent possibility of his being released, the preventive detention order cannot be passed. In *Baby Devassy Chully* v. *Union of India,*[134] on 12.4.05, the court had granted bail to the appellant in respect of certain offences registered against him but he did not avail its benefit till the date the detention order was passed on 03.05.05 under section 3(1) of the COFEPOSA but there was nothing to prevent him from coming out of jail after getting the bail order. The court held that it could be presumed that at any moment, the detenu might come out of jail and indulge in prejudicial activities. In view of these facts and also because of the fact that the detaining authority was aware of the grant of bail and had clearly stated the same in the grounds of detention, the court rejected the argument that the detention order passed against the appellant was bad. The court also held that the detaining authority was conscious of all relevant aspects and passed the impugned order of detention in order to prevent the appellant from abetting the smuggling of goods in future. If all the relevant grounds for detention exist and they have been taken into consideration, the satisfaction of the detaining authority cannot be questioned by the court.

Similarly, in *Saeed Zakir Hussain Malik* v. *State of Maharashtra*,[135] the detenu (appellant's brother) along with some other persons was released on bail after arrest for alleged fraudulent export by using forged documents. No efforts were made for fifteen months to get the bail cancelled and forfeit the amount of security deposited. The preventive detention order was passed after one year of his release. The said

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132 *Id.* at 2006.
133 AIR 2012 SC 321.
134 2012 (10) SCALE 176.
135 AIR 2012 SC 3225.

order was served on the detenu after fourteen and a half month. The order was quashed as there was no satisfactory explanation about delay in execution of the order. The delay in passing or executing the order was held to be violative of article 22(5) of the Constitution of India. In *Dropti Devi* v. *Union of India*,[136] however, the detention order was upheld as the same could not be executed on account of the 'contumacious conduct' of the person against whom the order had been passed. The court rejected the plea that since the maximum time of one year for which the order would have remained in force had already lapsed, no purpose for execution of the order survived.

In *Rushikesh Tanaji Bhoite* v. *State of Maharashtra*,[137] the detention order had been passed in December, 2010 against a person, who was already on bail in connection with an offence registered against him in August, 2010. The detention order had been passed under the Maharashtra Prevention of Dangerous Activities of Slumlords, Bottleggers, Drug Offenders and Dangerous Persons Act, 1981 on the ground that detenu's activities were prejudicial to the maintenance of public order and he was a dangerous person. The grounds of detention indicated that the detenu had been prosecuted for various offences registered in 1980 and in 2010. The court found that the fact that while passing the impugned detention order, the detaining authority was not aware of the fact that the detenu had already been enlarged on bail for the alleged offence registered in August, 2010 and the bail order was not placed before him. Further, the offences alleged in 1980 were not proximate to the passing of the detention order. The court, therefore, quashed the detention order.

Preventive detention not a substitute for ordinary criminal law

In *Munagala Yadamma* v. *State of A.P.*,[138] the appellant's husband was served with a detention order dated 15-2-2011 under section 3(1) read with sections 2(*a*) and 2(*b*) of the Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986 on the ground that the detenu was a bootlegger and recourse to normal legal procedure would involve more time and would not be an effective deterrent in preventing the detenu from indulging in further prejudicial activities. Further, the detenu was involved in several cases of violation of the provisions of section 7-A read with section 8(c) of the Andhra Pradesh Prohibition Act, 1995, involving illicit distillation of liquor. The court quashed the impugned detention order on the ground that the offences allegedly committed by the appellant attracted punishment under the Andhra Pradesh Prohibition Act and the procedure prescribed under that Act had to be followed; taking recourse to preventive detention laws was not warranted. The court, while quashing the impugned detention order, observed:[139]

> Preventive detention involves detaining of a person without trial in order to prevent him/her from committing certain types of offences. But such

136 AIR 2012 SC 2550.
137 AIR 2012 SC 890.
138 (2012) 2 SCC 386.
139 *Id.* at 388.

detention cannot be made a substitute for the ordinary law and absolve the investigating authorities of their normal functions of investigating crimes which the detenu may have committed. After all, preventive detention in most cases is for a year only and cannot be used as an instrument to keep a person in perpetual custody without trial.

No interference with detention order on merits

When the detaining authority had passed the detention order keeping before him all the relevant factors, the court will not interfere with the order by substituting its own view for that of the detaining authority. In *Subramanian* v. *State of T.N.*,[140] the commissioner of police passed the detention order on 21.7.2011, under section 3 of the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Sand Offenders, Slum-Grabbers and Video Pirates Act, 1982 holding the detenu to be a "goonda" noticing his involvement in a case of 18.7.2011 as well as three past cases of the years 2008 and 2010. The court, upholding the impugned detention order, stated that the incidents were "highlighted in the grounds of detention coupled with the definite indication as to the impact thereof which have been precisely stated in the grounds of detention mentioned above. All the incidents mentioned in the grounds of detention clearly substantiate the subjective satisfaction arrived at by the detaining authority as to how the acts of the detenu were prejudicial to the maintenance of public order."

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

A detenu has a constitutional right to make a representation and get the same considered as expeditiously as possible under article 22(5); any unreasonable and unexplainable delay in considering the representation is held to be fatal to the continued detention of the detenu. In *Rashid Kapadia* v. *Medha Gadgil,*[141] detention order dated 20.07.2011 passed under section 3(1) of the COFEPOSA was challenged, *inter alia,* on the ground that the same was vitiated as the representation of the petitioner dated 06.8.11 was rejected only on 07.09.11 after an inordinate delay of one month. The court noted that parawise remarks of the sponsoring authority (customs department) were called by the detenu on 09.08.11 and same was responded to on 26.08.11 after a delay of fifteen days. The reasons for such delay had not been explained by the sponsoring authority. The court quashed the detention order as it found nothing on the record to explain the abovementioned delay on the part of the custom's department.

XII RIGHT TO RELIGIOUS FREEDOM

What should be the role of a welfare state like India in purely religious matters? How much and in what manner should the state assist the pilgrims in their pilgrimage and what should be the manner and extent of state regulation during pilgrimage? A pilgrimage undertaken at the cost of others, be it state or anyone else, does not give

140 (2012) 4 SCC 699; see also *Ummu Sabeena* v. *State of Kerala* (2011) 10 SCC 781.
141 (2012) 11 SCC 745.

as much peace and salvation as at one's own cost. Unfortunately, the central and state governments encourage and subsidize pilgrimages for extraneous considerations which do not find favour with the court.

Haj pilgrimage

Reasonableness of requirements for registration of PTOs

The notable example is the judgment of Aftab Alam, J in *Union of India* v. *Rafique Shaikh Bhikan*[142] with respect to Haj pilgrimage. The Haj pilgrimage is performed either through Haj Committee established under the Haj Committee Act, 2002 or through private operator/travel agent (PTOs). The number of pilgrims is fixed by the Kingdom of Saudi Arabia through a bilateral agreement entered into with the Government of India. Prior to 2002, the PTOs were allotted seats directly by the Kingdom of Saudi Arabia. Since 2002, the PTOs were required to approach only through Government of India which allots seats after their registration with the Government of India. A PTO is to be allotted not less than fifty seats. There is a complete divergence in the intention of allotting seats to PTOs. While for the government, the intention is to provide better amenities and trouble-free pilgrimage, for PTOs, this is a very lucrative commercial venture where they would earn handsome amounts within a short span of time. Since 2005, the number of PTOs has substantially increased. While in 2005, the number of PTOs was merely 239 with 35,960 seats allotted to them, the number increased to 567 in 2011 with 45,441 seats allotted to them. The registration of PTOs and allotment of seats to them is done by policy annually declared by the government.

The PTO policy for the year 2011 was challenged by some of the PTOs on several grounds including arbitrariness and unreasonableness. The court pointed out that the object of registering PTOs was not to distribute them seats for making profit but to ensure that the pilgrims may be able to perform their rigorous rituals within the time-bound schedule.

(i) Registration of only one member of the family was a valid requirement

The court rejected the argument that clause 4 of the policy, which restricted registration of only one member of a family (husband/wife and dependent children) as PTO to be a reasonable restriction. The court held that there were a larger number of applicants and all could not be registered as PTOs. Moreover, the term 'family' had clearly been defined and there was no confusion.

(ii) Requirement of minimum office space

The requirement of 250 sq. ft. office area (carpet area) for an applicant was also held to be a reasonable requirement, keeping in view the interest of the pilgrims as paramount. The court pointed out that a PTO has to be allotted minimum of 50 pilgrims who have to be extensively briefed about the pilgrimage as they have no experience about a foreign country and also about all the rituals and procedure to be followed during Haj. The PTO has to enter into individual agreement and the pilgrims have to visit the office of PTO. All logistics including ticketing, accommodation, visa have to be provided by the PTO for which the pilgrim has to

142 AIR 2012 SC 2453 : (2012) 6 SCC 265.

remain present. Moreover, the requirement also ensures that only genuine persons apply for registrations who do not indulge in black marketing by selling the seats to others for profit. In the past, complaints in this matter had been received by the government. The condition sought to protect the interest of the pilgrims.

(iii) Requirement of minimum turnover

The court also upheld the requirement of rupees one crore turnover for the applicant as the turnover for fifty pilgrims itself would be rupees seventy-five lakhs and, therefore, the requirement of turnover of rupees one crore was a very modest figure.

(iv) Requirement of refundable security

The requirement of refundable security deposit of rupees twenty-five lakhs was also reasonable as it aimed at ensuring that the pilgrims while on pilgrimage do not face any difficulty in getting medical or any other kind of promised facilities and assistance in a foreign country.

(v) Pendency of court case

The requirement that the applicant should have no case pending against him/her at the time of making application only meant that case should be such which might make the applicant ineligible for registration and not every type of case. This requirement was also held to be reasonable.

The court did not find any of the above requirements to be arbitrary or unreasonable. It, however, in order to improve the system further, accepted that the applications could be made on-line as indicated by the attorney general.

Measures for improvement

The court also pointed out serious omission in the policy as it did not require the applicant to disclose the kinds of arrangements made by him/her for the pilgrims and the charges they proposed to levy on them. It was necessary to give some basic idea about these matters. Moreover, the court suggested the government to reduce the number of PTOs to be registered from the present 900 to 600-700.

The Haj subsidy

The subsidy given by the government for Haj pilgrimage was upheld by the Supreme Court as only a relatively small part of any tax collected was utilised for providing some conveniences or facilities or concessions to a religious denomination, and that was not violative of article 27 of the Constitution.[143] In 1994, the Haj subsidy was rupees 10.51 crores which went up to rupees 685 crores in 2011. The subsidy was meant for air fare. Aftab Alam, J found no justification for charging much lower than even the normal air fare from the pilgrims. He observed:[144]

> We also take note of the fact that the grant of subsidy has been found to be constitutionally valid by this Court. We are also not oblivious of the fact that in many other purely religious events there are direct and indirect deployment of State funds and State resources. Nevertheless, we are of the

143 *Prafull Gordia* v. *Union of India* (2011) 2 SCC 568; see S N Singh, "Constitutional Law – I (Fundamental Rights)", XLVII *ASIL* 171 at 212 (2011).

144 *Supra* note 142 at 2463.

> view that Haj subsidy is something that is best done away with.
>
> This Court has no claim to speak on behalf of all the Muslims of the country and it will be presumptuous for us to try to tell the Muslims what is for them a good or bad religious practice. Nevertheless, we have no doubt that a very large majority of Muslims applying to the Haj Committee for going to Haj would not be aware of the economics of their pilgrimage and if all the facts are made known a good many of the pilgrims would not be very comfortable in the knowledge that their Haj is funded to a substantial extent by the government.

The court also quoted Holy *Quran* where it stated that Haj was a duty of mankind owed to Allah for those who can afford the expenses (conveyance, provision and residence). The court directed the central government "to progressively reduce the amount of subsidy so as to completely eliminate it within a period of 10 years from today."

It may be pointed out that while upholding the Haj subsidy, the court had looked merely to the *legality* of the subsidy and decided the question solely on the basis of 'small' quantum of money spent for the purpose. On the other hand, Alam J looked at the question of Haj subsidy purely from the point of religion as he relied on what had been provided in the Holy Quran. This view is further supported by the fact when the learned judge stated that the "subsidy money may be more profitably used for upliftment of the community in education and other indices of social development." The observations of the court clearly indicate as to (i) why should Haj pilgrimage of affluent Muslims be at all subsidised and (ii) why should the Haj pilgrimage at all be subsidised for any Muslim because the great religious purpose of going for Haj would stand frustrated.

The direction of the court to gradually abolish subsidised pilgrimage deserves to be taken as an eye-opener to the governments as well as the pilgrims not only for Haj but for people belonging to all religions. Not only pilgrimage but all religious rituals and functions are most sacred and pious and none should undertake them at the cost of others including the government.

The goodwill Haj delegation

The court also had serious objection to the large number of persons, say about 30, going in the form of Goodwill Haj Delegation without there being any justification. The court noted that a large number of persons selected arbitrarily on irrelevant considerations were part of the delegation which serves hardly any purpose. The court directed that the delegation, if any, should not include more than ten members selected on a reasonable basis.

XIII RIGHTS OF MINORITIES

How to decide whether a trust or educational institution is a minority trust or institution? In *State of Kerala* v. *Very Rev. Mother Provincial*,[145] M. Hidayatullah, CJ had held that article 30(1) contemplates two rights which are separated in point

145 (1970) 2 SCC 417.

of time. The first right was the initial right to establish, i.e. to bring into being, institutions by a minority community of its own choice. The chief justice further held:[146]

> It matters not if a single philanthropic individual with his own means, founds the institution or the community at large contributes the funds. The position in law is the same and the intention in either case must be to found an institution for the benefit of a minority community by a member of that community. It is equally irrelevant that in addition to the minority community others from other minority communities or even from the majority community can take advantage of these institutions. Such other communities bring in income and they do not have to be turned away to enjoy the protection.

Relying on the above view, the Supreme Court in *T. Varghese George v. Kora K. George*,[147] held:

> The negative test is that a contribution from other communities to a minority institution and conferring of benefits of the institution to the majority community are not the factors which matter in deciding the minority character of the institution. The positive test is that the intention in founding the institution must be to found an institution for the benefit of a minority community. As far as these negative tests are concerned, they can be said to be satisfied in the present case. But the positive test which is more significant, namely, that the intention must be to found an institution for the benefit of a minority community, is not satisfied. We do not find anywhere in the initial declaration made by the founder that the Institution was to be a minority institution. All the trustees nominated were on ex-officio basis or on the basis of their qualifications and not on the basis of religion. The funds and income was to be utilised for encouraging poor and deserving students irrespective of caste, creed or religion. It is nowhere stated in that declaration that the Trust was being created for the benefit of the Christian community.

In the present case, a trust was created by a christian under the name of "T. Thomas Educational Trust" for running a school. The trust could accept donations in any manner from any person or institution and the funds could be applied exclusively for the purpose of the trust "including financial assistance to poor and deserving people or students *irrespective of caste, creed or religion.*" The court held that the intention of the founder was not to establish a minority trust and he did not establish the trust with any restricted benefit for a religious community. Merely because the founder of the trust belonged to a particular community, the persons belonging to that community cannot claim exclusive right to administer the trust. Both the establishment and administration must be by and for a minority to avail

146 *Id.* at 418.
147 (2012) 1 SCC 369 at 388-89.

the right under article 30 as the right conferred on minorities under that article was only to ensure equality with the majority and that was not intended to place the minorities in a more advantageous position *vis-à-vis* the majority.

The right of the minorities to establish and administer educational institutions under article 30 does not prohibit the state from applying the provisions of the Right of Children to Free and Compulsory Education Act, 2009 to aided minority educational institutions which requires the institutions to provide free and compulsory education to children of the age group of 6 to 14 subject to a maximum of 25 per cent, depending upon its annual recurring aid or grants received. Such a requirement did not violate article 30. Likewise, the provision prescribed under the above Act requiring minority to follow national and state curriculum did not violate article 30.[148]

XIV RIGHT TO CONSTITUTIONAL REMEDIES

Judicial review of policy decisions

Ordinarily, there can be no judicial review of policy decisions but the government is accountable to courts for the legality of those decisions[149] as also for violation of fundamental or other rights of the individuals.[150] In *Centre for PIL* v. *Union of India* (2G spectrum case),[151] the court had considered the validity of 'first come first served' policy of the central government in allocating 2G spectrum. While conceding the limits of judicial review on a policy decision, Singhvi, J observed:[152]

> (T)he Court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of

148 *Society for Un-Aided P. School of Rajasthan* v. *Union of India*, AIR 2012 SC 3445.

149 *Centre for PIL* v. *Union of India* (2011) 4 SCC 1; also see *State of Gujarat* v. *Arvindkumar T. Tiwari* (2012) 9 SCC 545 ("Fixing eligibility for a particular post or even for admission to a course falls within the exclusive domain of the legislature/ executive and cannot be the subject-matter of judicial review, unless found to be arbitrary, unreasonable or has been fixed without keeping in mind the nature of service, for which appointments are to be made, or has no rational nexus with the object(s) sought to be achieved by the statute. Such eligibility can be changed even for the purpose of promotion, unilaterally and the person seeking such promotion cannot raise the grievance that he should be governed only by the rules existing, when he joined service. In the matter of appointments, the authority concerned has unfettered powers so far as the procedural aspects are concerned, but it must meet the requirement of eligibility, etc. The court should, therefore, refrain from interfering, unless the appointments so made, or the rejection of a candidature is found to have been done at the cost of "fair play", "good conscience" and "equity"). In *Brij Mohan Lal* v. *Union of India* (2002) 5 SCC 1, the apex court issued several directions regarding establishment of fast track courts for expeditious disposal of pending cases.

150 *Rustom Cavasjee Cooper* v. *Union of India* (1970)1 SCC 248; *Bennett Coleman & Co*. v. *Union of India* (1972) 2 SCC 788; *BALCO Employees' Union* v. *Union of India* (2002) 2 SCC 333; *Nandini Sundar* v. *State of Chhattisgarh*, AIR 2011 SC 2839.

151 AIR 2012 SC 3725.

152 *Id.* at 3764.

> those who are entrusted with the task of framing the policies. We are also conscious of the fact that the Court should not interfere with the fiscal policies of the State. However, when it is clearly demonstrated that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of Court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognized parameters. When matters like these are brought before the judicial constituent of the State by public spirited citizens, it becomes the duty of the Court to exercise its power in larger public interest and ensure that that the institutional integrity is not compromised by those in whom the people have reposed trust and who have taken an oath to discharge duties in accordance with the Constitution and the law.

Similar views were expressed by the court in *Natural Resources Allocation* case in the following words:[153]

> (I)t needs to be emphasised that this Court cannot conduct a comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode, if there is one universal efficacious method in the first place. It respects the mandate and wisdom of the executive for such matters. The methodology pertaining to disposal of natural resources is clearly an economic policy. It entails intricate economic choices and the Court lacks the necessary expertise to make them. As has been repeatedly said, it cannot, and shall not, be the endeavour of this Court to evaluate the efficacy of auction vis-à-vis other methods of disposal of natural resources. The Court cannot mandate one method to be followed in all facts and circumstances. Therefore, auction, an economic choice of disposal of natural resources, is not a constitutional mandate. We may, however, hasten to add that the Court can test the legality and constitutionality of these methods. When questioned, the courts are entitled to analyse the legal validity of different means of distribution and give a constitutional answer as to which methods are ultra vires and intra vires the provisions of the Constitution. Nevertheless, it cannot and will not compare which policy is fairer than the other, but, if a policy or law is patently unfair to the extent that it falls foul of the fairness requirement of Article 14 of the Constitution, the Court would not hesitate in striking it down.

In *Brij Mohan Lal* v. *Union of India*,[154] the Supreme Court, on the basis of various judgments, laid down the following tests to decide whether the court should or should not interfere with the policy decisions of the executive:

> (i) If the policy fails to satisfy the test of reasonableness, it would be unconstitutional.

153 (2012) 10 SCC 1 at 97.
154 (2012) 6 SCC 502 at 546-47.

(ii) The change in policy must be made fairly and should not give the impression that it was so done arbitrarily on any ulterior intention.

(iii) The policy can be faulted on grounds of mala fides, unreasonableness, arbitrariness or unfairness, *etc.*

(iv) If the policy is found to be against any statute or the Constitution or runs counter to the philosophy behind these provisions.

(v) It is *dehors* the provisions of the Act or legislations.

(vi) If the delegate has acted beyond its power of delegation.

Cases of this nature can be classified into two main classes: one class being the matters relating to general policy decisions of the state and the second relating to fiscal policies of the state. In the former class of cases, the courts have expanded the scope of judicial review when the actions are arbitrary, mala fide or contrary to the law of the land; while in the latter class of cases, the scope of such judicial review is far narrower. Nevertheless, unreasonableness, arbitrariness, unfair actions or policies contrary to the letter, intent and philosophy of law and policies expanding beyond the permissible limits of delegated power will be instances where the courts will step in to interfere with government policy.

In *Avishek Goenka* v. *Union of India,*[155] a public inter litigation was filed highlighting the grave issue of non-observance of norms/regulations/guidelines related to proper and effective subscriber verification by various service providers prior to selling the prepaid mobile connections to them. The court noted that this was a policy matter but it involved the national security. The court, therefore, held that it was not for the court to examine the merit or otherwise of such policy and regulatory matters which were determined by expert statutory bodies possessing requisite technical know-how. However, the court did step in and directed the concerned technical bodies to consider the matter in accordance with law, while ensuring that public interest was safeguarded. In *Brij Mohan Lal* v. *Union of India*,[156] while refusing to interfere with the policy decision taken by the Governments regarding continuation or otherwise of fast track courts, "to protect the guarantees of article 21 of the Constitution, to improve the justice delivery system and fortify the independence of judiciary, while ensuring attainment of constitutional goals as well as to do complete justice to the lis" before the court, in terms of article 142 of the Constitution, the court passed a number of orders and directions.

Effect of not availing alternative remedy – abuse of judicial process

Ordinarily, an efficacious alternative remedy must be exhausted before approaching the high court under articles 226 and 227 for enforcement of fundamental rights or for any other purpose and the Supreme Court under articles 32 and 136 of the Constitution.[157] But this rule is not absolute and the courts have

155 (2012) 5 SCC 275.

156 (2012) 6 SCC 502.

157 See *Assistant Commissioner (CT) LTU* v. *Amara Raja Batteries Limited* (2009) 8 SCC 209 *Dhampur Sugar Mills Ltd.* v. *State of U.P.* (2007) 8 SCC 338; *Satish Chandra* v. *Registrar of Coop. Societies* (1994) 4 SCC 332; *Delhi Judicial Service Assn*. v. *State of Gujarat* (1991) 4 SCC 406.

been entertaining writ petitions under these provisions in appropriate cases even when the alternative remedy had not been exhausted. If, however, the alternative remedy has been availed and the matter is pending before the alternate forum, filing of a writ petition would be considered to be an abuse of the process of the court.[158] In this case, the writ petition under article 226 and proceedings under sections 482 and 483, Cr PC were pending before the High Court of Delhi challenging the order of the trial court when a writ petition was filed before the Supreme Court under article 32 for the same purpose contending that the fundamental right under articles 20(3) and 21 were violated by the impugned order of the trial court as the petitioner was being cross-examined in a case for the last five years. The apex court, while dismissing the petition on the ground of abuse of the judicial process, imposed cost on the petitioner.

Judicial review of technical matters

The court refused to exercise its power of judicial review in a technical matter like testing of genetically modified organisms (GMOs). In *Anna Rodrigues* v. *Union of India*,[159] public interest petition under 32 was filed stating that a grave and hazardous situation, raising bio safety concerns, was developing in the country due to release of GMOs which was being allowed to be released in the environment without proper scientific examination which was affecting not only environment but also human beings. The prayer in the petition was that the respondent be directed "not to allow any release of GMOs into the environment by way of import, manufacture, use or any other manner." The court conceded that it had no expertise to determine the technical issue raised in the case and, therefore, it appointed an expert committee to look into all issues raised in the petition and submit a report within the stipulated time.

XV POWER TO AWARD COMPENSATION

The award of compensation by the courts for violation of fundamental rights under articles 21 and 22 has become a general trend now though no uniform principles have been evolved by the courts to determine the amount of compensation. The question of quantification of the amount of compensation is within the sole discretion of the court. In *Mehmood Nayyar Azam* v. *State of Chhatisgarh*,[160] the

158 *Karuna Singh* v. *State of NCT of Delhi*, AIR 2012 SC 2814; also see *V.K. Naswa* v. *Home Secretary, Union of India*, JT 2012 (3) SC 292 : 2012 (1) SCALE 283 : (2012) 2 SCC 542, where the court dismissed the writ petition under art. 32 as the petitioner had already made a complaint about misuse of the national flag with other authorities; *Common Cause* v. *Union of India* (2012) 11 SCC 600 (allegations of corruption against the former chief justice of India).

159 AIR 2012 SC (Supp) 671.

160 AIR 2012 SC 2573 : 2012 (7) SCALE 104; see also *Banothi Nure Bai* v. *Secy., A.P.E.I. Society*, AIR 2012 AP 99; *District Health Officer Fiamaneri* v. *Sounthari*, AIR 2012 Mad. 207; *Motimbai* v. *State of Chhatisgarh*, AIR 2012 Chh. 111; *Banalata Dash* v. *State of Orissa*, AIR 2012 Ori. 97; *Chief Secy*., *Govt. of Manipur* v. *Naorem Ongbi Rashmani Devi*, AIR 2012 Gau. 113; *Kunj Parida* v. *State of Orissa*, AIR 2012 Ori. 126; *Minor Muthulakshmi* v. *Govt. of T.N*., AIR 2012 Mad. 189.

appellant, an *ayuvedic* doctor and social activist, used to raise agitations and spread awareness against exploitation of people belonging to weaker and marginalized sections of society. This caused discomfort to those with vested interests in coal mine areas. He was threatened with dire consequences by coal mafia, trade union leaders, police officers, *etc*. As the petitioner refused to succumb to pressure and threats, a number of criminal cases were registered against him by the police and he was arrested. In the police custody, the petitioner was abused and physically assaulted. He was also photographed compelling him to take a placard in Hindi which read as "I, Dr. M.N. Azam, am a cheat, fraud, thief and rascal." The photograph was circulated in the general public. The petitioner's complaint to the national human rights commission bore no results.

The court pointed out that every citizen including a person in police custody had a right to live with human dignity. The court noted that the petitioner had undergone physical and mental torture during police custody. The court, after considering various aspects of the case and without laying down any principle, granted compensation of rupees five lakhs to the petitioner to be paid by the state and it further directed that the same be realised from the erring police officials in equal proportion from their salary.

XVI CONCLUSION

The year 2012 saw some significant pronouncements of apex court in controversial areas. The notable pronouncements of the Supreme Court during the year related to the question of reservation in promotions,[161] methods to be followed for allocation of natural resources by the state and the permissible limits of judicial review of policy decisions,[162] limits of media reporting of *sub judice* matters.[163] Another important case related to eligibility of persons to be appointed as information commissioners under the Right to Information Act, 2005[164] in which the court virtually re-wrote the provisions of the Act. Some new areas of interest were cases pertaining to inter-linking of rivers[165] and fundamental right to sleep.[166] The decisions reflect the commitment of the court to contain ills of the administration in the areas of violation of human rights, economic matters adversely affecting the public interest and also the actions of the media.[167] By and large, the apex court deserves a pat for the excellent way in which it tried to curb the mal-administration of the executive which has become corrupt and inefficient and is going berserk with the passage of time.

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161 *U.P. Power Corpn. Ltd*. v. *Rajesh Kumar*, AIR 2012 SC 2728.

162 *Centre for Public Interest Litigation* v. *Union of India*, AIR 2012 SC 3725; *Allocation of Natural Resources, In re Special Reference No. 1 of 2012* (2012) 10 SCC 1.

163 *Sahara Real Estate Corp*. *Ltd*. v. *Securities & Exchange Board of India*, AIR 2012 SC 3829.

164 *Namit Sharma* v. *Union of India,* 2012 (8) SCALE 593 : (2013) 1 SCC 745.

165 *In re Networking of Rivers (*2012) 4 SCC 51 : 2012 (3) SCALE 74 : JT 2012 (3) SC 234.

166 *In re Ramlila Maidan Incident Dt. 4/5.6.2011* v. *Home Secretary, UOI*, JT 2012 (3) SC1.

167 *Mohammed Ajmal Mohammad Amir Kasab* v. *State of Maharashtra,* AIR 2012 SC 3565.