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CONSTITUTIONAL LAW – II

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I INTRODUCTION

CHANGING NATURE of role of the state particularly complexes the nature of governance. State governance is not the monopoly of the executive as it is the constitutional governance. For that purpose it is not legislative governance or even judicial governance. As it is Constitutional governance, the Constitution of India has distributed the governance to the three organs. A closer look at the Constitution supports the notion that governance is not an exclusive domain of any one organ of the state but is supposed to be the combined effort of each organ. Probably that is the reason why Constitution does not adhere to strict compliance of separation of powers.[1]A combined reading of articles 13,32,141,136 and 226 however, gives the judiciary a special position as compared to the other two organs. These articles make judiciary a trustee, a watch dog and a protector of people from abuse of governance. In that sense the Constitution confers a decisive role to the judiciary in promoting constitutional governance. Constitutional interpretation is of significant importance in constitutional governance. The authority of the legislature and the executive in framing the policy, its implementation and appointment to the posts having impact in constitutional governance, it is important to see how the judiciary plays neutralizing yet decisive role in underpinning the constitutional values. This year's survey focuses on how far the judiciary has balanced these interests and in the process how it has prevented constitutional destabilization and helped in the restoration of constitutional governance.

II POWER OF PRESIDENT TO GRANT PARDON: ARTICLE 72

Power to grant pardon is a prerogative of the President and the governor under the Indian Constitution. Granting pardon may seem contradicting with the notion of rule of law that no one is above law. But such a power has become

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1 See Phiroza Anklesaria, Judicial Law Making – Its Strength and Weaknesses, (2012) 1 SCC (J) 25.

standard feature of most of the common law countries. The power of the President under article 72 is unfettered and as a result has a potential for misuse. However, the apex court is consistently reluctant in prescribing the guidelines in exercising such power let alone bringing the same under judicial review. Though in *Epuru Sudhakar* v. *Government of A.P.*[2] it was held that the power to grant pardon is a prerogative power but it is not *ipso facto* immune from judicial review, in fact such review is very limited. In *Devender Pal Singh Bhullar* v. *State of NCT of Delhi*,[3] Supreme Court reviewed the scope of the power of judicial review in a case where there was 8 years[4] delay caused by the President in deciding the clemency petition filed by the petitioner under article 72 of the Constitution of India. The petitioner was charged under various provisions[5] of the IPC 1860, Passports Act, 1967 and Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) and was convicted for killing 9 innocent persons and injuring 17 others. The following questions were raised before the Supreme Court for consideration:[6]

(a) What is the nature of power vested in the President and the Governor under Article 72 and Article 161 of the Constitution of India respectively?

(b) Whether the delay in disposal of a mercy petition filed under Articles 72 and 161can be a sole ground for court's intervention for commutation of sentence of death to life imprisonment irrespective of any other factors relating to the crime and the criminal?

(c) Whether the issue of delay in the disposal of a petition filed under Article 72 or 161 of the Constitution of India when the

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2 (2006) 8 SCC 161.

3 (2013) 6 SCC 195.

4 The brief facts that lead to the case are that the petitioner on 14.1.2003 applied for commutation of his sentence to the President under art. 72 of the Constitution. Several representations were made by different persons, organizations including international communities requesting for grant of clemency. In April 2003, the President's Secretariat forwarded the application to the Ministry of Home Affairs. The ministry after several deliberations considering internal and external petitions finally on 11.7.2005 recommended the President to reject the petition. In spite of such express recommendation no action was taken by the President for next five years and nine months. On 29.4.2011the Ministry of Home Affairs requested the President's secretariat to return the file of the petitioner and same was withdrawn on 6.5.2011, for reviewing the petitioner's case. After reexamination of the file the Home Minister observed that the petitioner being involved in terrorist activities he does not deserve any mercy or compassion and accordingly on 10.5.2011 recommended the President to reject the commutation of sentence. This time the President accepted the advice of the Home Minister and rejected the mercy petition.

5 Ss. 419, 420, 468 and 471IPC, S. 12 of the Passports Act, 1967 and ss. 2, 3 and 4 TADA.

6 *Supra* note 3 at 227.

accused found guilty of committing offences under TADA and other similar statutes be treated at par as per *Triveni Ben*[7]'s guidelines with mercy petition of accused found guilty for committing murders due to personal animosity or over property and personal disputes?

(d) What is the extent of power of judicial review of the decision taken by the President and the Governor under Article 72 and Article 161 of the Constitution of India respectively?

After reviewing its earlier judgments in number of cases[8] and some judgments of other jurisdictions,[9] the two judge bench of the Supreme Court held that article 72 and article 161 of the Constitution of India imposes great Constitutional responsibility on the President and the governor respectively. This obligation has to be discharged by highest executives on the aid and advice of council of ministers. The Central and state governments has to assist the President and the Governor, as the case may be, by giving consideration to nature and magnitude of the crime, the impact on the society and public welfare.

The Supreme Court further held that while awarding the sentence of death, the court takes into consideration several factors including the nature of crime, the motive for the crime, the manner in which the crime is committed and so on. If the crime is brutal and heinous, involves killing of large number of innocent people without any reason, the court will be justified in declaring death penalty. The Constitutional duty imposed on the President and the Governor under article 72 and article 161 to grant mercy in such death penalty cases requires thorough review of all facts and figures and in such cases, the delay in disposing the petition under article 72 and article161 cannot be the sole factor for commutation of death sentence to life imprisonment.

The Supreme Court opined that mercy petitions by persons convicted under TADA and other similar statutes stand on a different footing than the petitions filed by persons convicted under general law for committing murders due to personal animosity or over property and personal disputes. Terrorists are responsible for taking lives of hundreds of innocent persons without having any mercy on them and so the delay in deciding such petitions, do not deserve mercy.

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7 (1989) 1 SCC 678.

8 *Jagmohan Singh* v. *State of U.P*. (1973) 1 SCC 20; *Rajendra Prasad* v. *State of U.P.* (1979) 3 SCC 646; *Bachan Singh* v. *State of Punjab* (1980) 2 SCC 684; *Maru Ram* v. *Union of India* (1981) 1 SCC 107; *Machhi Singh* v. *State of Punjab* (1983) 3 SCC 470; *Ediga Anamma* v. *State of A.P.* (1974) 4 SCC 443; *T.V.Vatheeswaran* v. *State of Tamil Nadu* (1983) 2 SCC 68; *K.P. Mohd.* v. *State of Kerala* 1984 Supp. SCC 684; and *Javed Ahmed* v. *State of Maharashtra* (1985) 1 SCC 275; *Triveniben* v. *State of Gujarat* (1989) 1SCC 678; *Daya Singh* v. *Union of India* (1991) 3 SCC 61; *Epuru Sudhakar* v. *Government of A.P.* (2006) 8 SCC 161.

9 *Biddle* v. *Perovoch* 274 US 480, *Furman* v. *State of Georgia*, 408 US 238.

The Supreme Court while examining the scope of judicial review of the decision taken by the President and the Governor under article 72 and article 161 of the Constitution of India respectively, held that court's power of judicial review is very limited to the extent of non-application of mind to the relevant factors, use of extraneous or irrelevant considerations and exercise of *mala fide* or patent arbitrariness. The Supreme Court while concluding the judgment raised serious doubts on the large number of mercy petitions that remained pending between 1999 and 2011 for a period ranging from 1year to 13 years.

In another judgment of *Mahindra Nath Das* v. *Union of India*,[10]similar question that came up for consideration was whether the delay caused for 12 years in deciding a petition under article 72 of the Constitution of India be the basis for commutation of death sentence into life imprisonment. The petitioner was prosecuted for an offence under section 302 of the IPC, 1860. Relying heavily on *Triveniben* v. *State of Gujarat,*[11] the Supreme Court answered in affirmative and held that in the absence of sufficient reasons for the inordinate delay while disposing the mercy petitions, the petitioner is entitled for commutation of death sentence to life imprisonment.

In *Krishan* v. *State of Haryana*[12] another substantial question of law that was raised before the two judge bench of the Supreme Court was whether section 32-A[13] of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) violates articles 72 and 161 of the Constitution of India. Plain reading of section 32-A of the NDPS Act gives it an overriding effect over the Cr PC, 1973 or any other law for the time being in force. While analyzing the issue, the Supreme Court made a reference to a three judge bench judgment of this court in *Dadu@Tulsidas* v. *State of Maharashtra*,[14] where the court partly struck down section 32-A of the NDPS Act as unconstitutional to the extent it affected the functioning of criminal courts in India. However, the court upheld the Constitutional validity of section 32-A of the NDPS Act insofar as it takes away the right of the executive to suspend, remit and commute the sentence. In light of *Pradip Chandra Parija* v. *Pramod Chandra Patnaik* [15]court referred the matter to a larger bench for its consideration.

Both *Bhullar* and *Mahindra Nath* cases raise serious questions pertaining to the role of the President and the Governor under the Constitution with respect to

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10 (2013) 6 SCC 253.

11 *Supra* note 7.

12 AIR 2013 SC 2139.

13 S. 32-A of NDPS Act, 1985: No suspension, remission or commutation in any sentence awarded under this Act: Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any other law for the time being in force but subject to the provisions of Section 33, no sentence awarded under this Act (other than s. 27) shall be suspended or remitted or commuted.

14 (2000) 8 SCC 437.

15 AIR 2002 SC 296.

clemency. It is crystal clear that exercising such a power is neither a matter of grace nor mercy. It is even not a personal choice or belief of a person holding the constitutional post, but is a constitutional duty of great significance. Therefore, the least expected from the constitutional authority who happens to be the first citizen of this country is to exhibit utmost diligence in exercising such a duty and that to with great care and circumspection. The fact that several petitions are pending before the President ranging from 1 to 13 years[16] shows the apathy of the constitutional functionaries in discharging such an important constitutional obligation. The delay of execution of death sentence violates basic human rights and creates unwarranted pain and stress on the convict. That is the reason why such a practice has been condemned worldwide.[17] There is no justification for keeping a convict in suspense for years and it is humane to the courts in such a situation to lean in favour of commutation of sentence.

The court's reluctance in commutation of sentence in *Bhullar* in spite of such inordinate delay raises the question whether the requirements of article 21; just, fair and reasonable procedure to curtail life and personal liberty could be a fundamental right only in selective cases. No one can find a fault with the observation that the commutation of death sentence needs to be selective and based on the fact and circumstances and there is a need to take tough stand in cases of terrorism and related crimes. However, could one say that just, fair and reasonable procedure need not apply to these cases? The distinction between *Bhullar* and *Mahindra Nath* in applying the rule of commutation of sentence due to inordinate delay seems unfair. This is so even if one could agree that the delay to some extent is caused by the several requests and pressures received by the President from both national and international organizations.

The facts clearly show that the ministry had already communicated its decision recommending the President to reject the petition but inexplicably no action was taken by the President for 5 years 9 months. There is no reason to find fault with the ministry for not reminding the President as it is the constitutional obligation of the President and also the facts show that this is not the only case pending before the President. It is not the issue whether a person like *Bhullar* deserves the commutation but the real issue is what is the remedy for brazen violation of constitutional right by the highest constitutional functionary?

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16 The statistics produced by the additional solicitor general show that between 1950 and 2009, over 300 mercy petitions were filed of which 214 were accepted by the President and the sentence of death was commuted into life imprisonment. 69 petitions were rejected by the President. The result of one petition is obscure. However, about 18 petitions filed between 1999 and 2011 remained pending for a period ranging from 1 year to 13 years.

17 For example see: art. 5 of the Universal Declaration of Human Rights; art. 7 of the International Covenants on Civil and Political Rights; *Riley* v. *Attorney General of Jamaica* (1983) 1 AC 719, *Pratt* v. *Attorney General of Jamaica* (1994) 2 AC 1.

Though this is an uncomfortable question before the Supreme Court, the time has come to fix minimum guidelines on exercising such an important power to avoid recurrence of issues like *Bhullar, Kasab* and *Afzal Guru* to restore the confidence in the Constitution and rule of law in this country.

III DISQUALIFICATIONS FOR MEMBERSHIP IN LEGISLATURE: ARTICLE 102 AND 191

Free and fair election is a basic requirement for a democracy to survive. At the same time prevention of unscrupulous persons from the membership of legislature is also equally important. To ensure these requirements, Constitution of India prescribes several qualifications and disqualification for persons in contesting elections.

In *Lily Thomas* v. *Union of India*[18] two public interest litigations were filed challenging the validity of section 8 (4) of the Representation of the People Act, 1951 as *ultra vires* to the Constitution. Disqualification of members of the Parliament and the members of both state legislative assembly and council are contained in articles 102 and 191 respectively. But these disqualifications are not exhaustive in nature. Thus, both article 102(1) (e) and 191(1) (e) empowered Parliament to lay down by law any other disqualifications. Accordingly Parliament enacted Representation of the People Act, 1951. Chapter III of the Act prescribes further disqualifications. Section 7 (b) of the Act defines "disqualified" as disqualified for being chosen as, and for being, a member of either house of Parliament or of the legislative assembly or legislative council of a state. Section 8 of the Act on the other hand prescribes disqualification on conviction of certain offences.

It also provides that once a person is convicted of an offence mentioned under section 8 he/she shall be disqualified from the date of conviction. However, sub-section (4) of section 8 of the Act provides different rules for disqualification to a person who is contesting and a person who on the date of the conviction is a member of Parliament or the legislature of a state. It states that in such cases the disqualification shall take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court. This differential treatment for contesting members from those already members of the Parliament or the legislature of a state was challenged as *ultra vires* to the Constitution.

The contention was that both articles 102 and 191 of the Constitution provide disqualification for contesting members and members of Parliament or of the legislative assembly or legislative council of a state. Hence, a legislation that was enacted by the Parliament under their articles cannot make any distinction between

18 AIR 2013 SC 2662.

these two categories while providing additional disqualifications. The Constitution Bench in *Election Commission, India* v. *Saka Venkata Rao*[19] also supports the same view by holding that article 191 lays down the same set of disqualifications for election as well as for continuing as a member. Further to strengthen this, it was brought to the notice of the court that while debating article 83 of the draft Constitution which is now article 102, a similar provision like section 8 (4) of the Act of 1951 was moved as an amendment but it was not incorporated by the Constituent Assembly. Therefore there is no legislative power to enact section 8 (4) as the intention of article 102 and 191 conferring the power on the Parliament to make necessary legislation is to make similar disqualification for both the categories. Further, there is no rationale for making an exception to the sitting members and such exception created by section 8(4) is arbitrary and discriminatory and is violative of article 14 of the Constitution.

The contention of legislative competence could be judged based on the provisions by which such a power is created and restricted. To enact section 8(4), it was contended that the Parliament was empowered by article 246(1) read with entry 97 of list I of the seventh schedule and article 248 of the Constitution, if not in articles 102(1)(e) and191(1)(e) of the Constitution.

However, the court felt that the principle underlying in article 248, read with entry 97 of list I, is that no legislature shall be without power to legislate on any subject simply because it has not been specifically mentioned. The residuary powers are created to meet such a situation and they are vested with Union. But when articles 102(1)(e) and 191(1)(e) of the Constitution expressly confers a power to the Parliament to enact law on disqualifications for membership of either House of Parliament or legislative assembly or legislative council of the state, it is safe to conclude that the power to make such law is located only in articles 102(1) (e) and 191(1) (e) of the Constitution and not in article 246(1) read with entry 97 of list I of the seventh schedule and article 248 of the Constitution.

Under articles102(1)(e) and 191(1)(e), a person shall be disqualified from contesting as well as continuing as member of either House of Parliament or legislative assembly or legislative council of the state if the Parliament makes any further disqualifications by enacting a law. As these articles apply to both the categories, the power conferred on the Parliament in this regard is to make uniform law for a person to be disqualified from being chosen as, and for being, a member. Therefore, the court held that Parliament does not have the power under articles 102(1)(e) and 191(1)(e) of the Constitution to make different laws for a person to be disqualified from being chosen as a member and for a person to be disqualified from continuing as a member. If a person can neither contest nor be chosen due to disqualification, he/she cannot even continue as a member of Parliament or the state legislature. With regards to the question as to when the seat of a member

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19 AIR 1953 SC 210.

would become vacant due to such disqualification, the court held that it will fall vacant on the day on which the member is convicted and there is no need to wait for the decision of the President or the Governor, as the case may be.

It was therefore held that Parliament has been given power to prescribe same disqualifications for contesting candidates and sitting members. Under the provisions of articles 101(3)(a) and 190(3)(a) of the Constitution, the disqualification will come into effect only in case of a sitting member of Parliament or a state legislature on the day the member is disqualified. Therefore, Parliament has exceeded its powers conferred by the Constitution in enacting sub-section (4) of section 8 of the Act and accordingly, Section 8 (4) of the Act is *ultra vires* the Constitution. As Parliament had no power to enact section 8(4) of the Act, the court felt that it is not necessary for going into the other issue; whether section 8 (4) of the Act is violative of article 14 of the Constitution.

Striking down section 8 (4) for differential treatment in *Lilly Thomas* case seems to be rational but the reasons for such decision seems to be non-judicious. Articles 102 and 191 in express terms confer the power on the Parliament to enact law for prescribing additional qualifications and disqualifications. However, these articles would not in any way restrict the nature of qualifications and disqualification to be prescribed and circumstances in which they may apply, as such a power is left to the Parliament. When constitutional delegation was made in express terms to Parliament, questioning the legislative competency seems to be farfetched, that too when such a question was specifically raised under article 32 alleging violation of fundamental rights. Supreme Court's reluctance to determine the constitutional validity under article 14 is inexplicable when the same conclusion could have been drawn under article 14.

IV DISQUALIFICATION ON GROUNDS OF DEFECTION: TENTH SCHEDULE

The tenth schedule was added to the Constitution of India with a view to curb the menace of defection. Speaker was conferred with a power to decide the disqualification of members of the house on the ground of defection. In *Speaker, Orissa Legislative Assembly* v. *Utkal Keshari Parida,*[20] an interesting question was posed to the Supreme Court in relation to the powers of the Speaker of the Orissa Legislative Assembly under Rule 6(1)[21] and (2)[22] of the Members of Orissa Legislative Assembly (Disqualification On Ground Of Defection) Rules, 1987

20 (2013) 11 SCC 794.

21 R 6 (1): No reference of any question as to whether a Member has become subject to disqualification under the Tenth Schedule shall be made except by a petition in relation to such Member made in accordance with the provisions of this rule.

22 R 6 (2): A petition in relation to a Member may be made in writing to the Speaker by any other Member: Provided that a petition in relation to the Speaker shall be addressed to the Secretary.

and paragraphs 2(1) (a) and 8 of the tenth schedule to the Constitution of India. The brief facts giving rise to the situation were that all the four elected members of Orissa Legislative Assembly belonging to the National Congress Party (NCP) joined the Ruling party, Biju Janata Dal. The President of National Congress Party (NCP) who was not the current member of the legislative assembly filed 4 separate disqualification petitions before the Speaker of the Orissa Legislative Assembly on ground of defection.

The issue that came before the Supreme Court was whether a non-member of legislative assembly can file an application for disqualification before the speaker of the legislative assembly in the absence of party member notwithstanding Rule 6(1) and (2) of the Members of Orissa Legislative Assembly (Disqualification on Ground of Defection) Rules, 1987. Rule 6 contemplates that the petition for disqualification under tenth schedule should be made to the speaker by any other member only. The Supreme Court while dealing with the issue said that legislative assembly rules framed by the speaker by virtue of delegated power entrusted under paragraph 8 of tenth schedule cannot supersede the substantive provisions of the Constitution. The intent of the tenth schedule[23] was to wipe out the evil of political defection. There is no possibility that the provisions of tenth schedule and the rules framed thereunder be interpreted to exclude any interested party from filing the petition for disqualification on ground of defection and if such is the case, it would completely defeat the object of the tenth schedule. The Supreme Court further held that the provisions of rule 6(1) and (2) should be read in such a manner that not only the member of the legislative assembly but also a petition filed for disqualification by a non-member or any interested person becomes maintainable before the speaker.

V POWER TO PUNISH FOR CONTEMPT: ARTICLE 129

In *Rajeshwar Singh* v. *Subrata Roy Sahara* [24] the Supreme Court examined the maintainability of a contempt petition filed under articles 129 and 142 of Constitution of India, read with section 12 of the Contempt of Courts Act, 1971 and Rule 12 of the Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975. This contempt petition was preferred in the case popularly described as 2G spectrum scam. The first information report (FIR) lodged by the CBI alleged that certain officials of the Department of Telecommunications during years 2000-2008 entered into a criminal conspiracy with certain private companies and took undue advantage of their official position in the grant of Unified Access Licenses causing wrongful loss to the nation, which was estimated to be more than Rs.22, 000 crores.

The Supreme Court ordered for a court monitored investigation and gave directions to ensure a comprehensive and co-ordinated investigation by the CBI

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23 Introduced by the Constitution (52nd Amendment) Act, 1985.

24 2013 AIR SCW 6876.

and the Enforcement Directorate. The Delhi High Court nominated an official from Delhi Higher Judicial Service to be a special judge to try cases relating to 2G spectrum scam. The Central Government issued two notifications for setting up of special court to exclusively try cases relating to 2G spectrum cases. The Supreme Court on noticing the various developments in the 2G spectrum case issued a detailed order stating that it will take serious note of any attempt made by any person or group of persons to interfere with the investigation by the CBI and the Enforcement Directorate in the 2G spectrum case.

The respondents sent a letter to the petitioner, the Assistant Director of Enforcement Directorate containing a wielded threat to start a negative campaign against him that gave way for the present contempt petition. A preliminary objection was raised by the respondents that the petitioner failed to observe the procedure prescribed by Contempt of Court Act, 1971 while approaching the court. Therefore, the Supreme Court has only examined the maintainability of this contempt petition. The basic objection that was raised is that the contempt petition is not maintainable since it has been filed without the consent of the Attorney General of India or other officer mentioned in section 15 of the Act. It was contended that the consent of the Attorney General is not an empty formality but a pre- requisite to initiate contempt of court proceedings hence, the petition is not maintainable.

It was held that when a court monitors a criminal investigation it becomes the responsibility and duty of the court to see that the officers carry the investigation properly and also to see that they are not intimidated or pressurized by others. People have high expectations and place trust and confidence in a court monitored investigation. Therefore, courts need to live up to those expectations and see that the investigation is not scuttled by any interference. The allegations made by the petitioner being serious and if they are accepted then there is a *prima facie* case of an attempt by the respondents to interfere with the investigation by the petitioner and would amount interference of administration of justice.

Further, it is natural for an investigation officer who receives any pressure or threat during investigation of the case under the monitoring of the court to report the same to the court. Therefore, there is nothing wrong invoking article 129 and article 142 to apprise Supreme Court about the difficulties that he is facing. Hence, the question whether non compliance of the procedure under the Act vitiates the proceeding under article 129, has been answered in negative by the court. It was observed that the law regarding the power of the Supreme Court in contempt matters is well articulated in *Delhi Judicial Service Association, Tis Hazari Court, Delhi* v. *State of Gujarat*[25] in which it was held that the power of the Supreme Court and the High Court under articles 129 and 215 respectively cannot be restricted and hampered by any ordinary legislation as they are courts of record. The inherent powers enjoyed by both the courts are unbridled and no limitations can be imposed.

25 (1991) 4 SCC 406.

The power of the Supreme Court under article 129 is vested by the Constitution itself and such a power cannot be abridged or abrogated. Therefore, the Act cannot control, regulate or limit the jurisdiction of the Supreme Court. In *Manilal Singh* v. *Dr. H. Borobabu Singh* [26] Supreme Court expressly stated that power under article 129 is a constitutional power and hence cannot be circumscribed or delineated either by the Contempt of Courts Act, 1971 or rules or even the rules to Regulate Proceedings for Contempt of the Supreme Court, 1975, framed in exercise of powers under section 23 of the Contempt of Court Act, 1971, read with article 145 of the Constitution of India.

Therefore even if the petitioner failed to comply with the provision of the Act it would not in any manner prevent or take away the power of the court to examine the contempt petition. The court has rightly held that the procedural requirement would not deter the court in examining the contempt petition as the court shall ensure obedience of its order and protect the investigating officers from harassment, or else upholding the dignity of the court would be at stake and would result in loss of public trust. Allowing the petition is also necessary as the court has a constitutional obligation to comprehend the truth, as allegations if proved would have far reaching implications in the case.

VI SCOPE OF ORIGINAL JURISDICTION: ARTICLE 131

Article 131 confers original jurisdiction to the Supreme Court where the dispute is between Union and the state or between the states. However several restrictions on this jurisdiction are also mentioned in the same article. In addition to these, article 262 imposes a further general restriction that no court can entertain any dispute regarding rivers and river valleys. The scope of the said articles was extensively discussed by the Supreme Court in *State of Andhra Pradesh* v. *State of Maharashtra.*[27]

State of Andhra Pradesh filed an original suit under article 131 of the Constitution of India complaining violations of the agreements dated 06.10.1975 and 19.12.1975 by Maharashtra. The major violation alleged by Andhra Pradesh was the construction of Babhali barrage by Maharashtra into the reservoir/water spread area of Pochampad Project on Godavari River. It contended that the construction of Babhali barrage would deprive Andhra Pradesh from having water for irrigation and drinking purposes.

Karnataka, Madhya Pradesh, Chhattisgarh and Orissa, the other riparian states of Godavari River were impleaded as defendants. Godavari River is the largest river in Peninsular India and the second largest in the Indian Union. Union of India constituted a tribunal under the Inter-State Water Disputes Act, 1956 on 10.04.1969 to settle long standing disputes among the States between Andhra Pradesh, Maharashtra, Karnataka, Madhya Pradesh, and Orissa regarding sharing

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26 (1994) Suppl. (1) SCC 718.

27 (2013) 5 SCC 68.

the water. While the proceedings before the tribunal were pending, Maharashtra and Andhra Pradesh entered into an agreement on 06.10.1975. One more agreement on 19.12.1975 was entered between Karnataka, Maharashtra, Madhya Pradesh, Orissa and Andhra Pradesh with regard to sharing the water. As a result the tribunal endorsed both these agreements and made them as part of its award on 27.11.1979. The award clearly mentioned that the division of Godavari River waters is based on the agreements entered between riparian states.

A preliminary question that was raised in this case was about the maintainability of the suit in the light of express bar on the courts under article 262. However, it is pertinent to note whether such a bar is only on sharing of water dispute or would article 262 imposes bar even on interpretation of the agreement when article 131 expressly mentioned 'any dispute between the States'? Though such an important question was raised, there is no express discussion which took place throughout the case and a closer look of the judgment would enable to draw a conclusion that article 262 does not bar the original jurisdiction of the Supreme Court in entertaining the dispute regarding the interpretation of the agreement even if it involved water sharing and such a dispute would not be treated as water dispute. Such an analogy could be drawn in the light of Supreme Court's willingness to decide the case on merits.

Power of Supreme Court to grant special leave: article 136

Article 136 is a novel feature of Indian Constitution which confers a wide discretionary power on the Supreme Court in accepting any appeal from any court or tribunal. As a result, it is subject to several interpretations. In *State of Madhya Pradesh* v. *Giriraj Dubey*,[28] the accused-respondent was prosecuted for the offences punishable under sections 294 and 436 of the IPC. However, sessions court acquitted him as there was no witness to the occurrence of the crime. In appeal, the judgment of acquittal was challenged on several grounds. The division bench of the High Court of Madhya Pradesh declined to grant leave to the state to prefer an appeal against the judgment of acquittal by the sessions court.

The contention of the appellant before the Supreme Court is that while declining to grant leave to appeal, the high court has not given any reason and simply stated that the prosecution has failed to establish the offence against the respondent by adducing adequate evidence. Therefore, the question is whether the high court is under the obligation to give reasons while dismissing the application for leave. Supreme Court after referring to several earlier judgments[29] held that high court must assign reasons and it is obligatory on the part of the court to ascribe the reasons for its decision so that it would enable the Supreme Court to examine the correctness of the view.

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28 2013 AIR SCW 1354.

29 *State of Maharashtra* v. *Vithal Rao PritiraoChawan* (1981) 4 SCC 129; *State of Orissa* v. *Dhaniram Luhar* (2004) 5 SCC 568; and *State of Rajasthan* v. *Sohan Lal* (2004) 5 SCC 573.

Explaining further, it was said that failure on the part of the high court in giving speaking orders would negate the opportunity of close scrutiny of the order by the appellate court. The other reason for such an obligation imposed on the courts is that stating of reasons indicates the application of mind by the judges. Therefore, when the high court decides whether to grant a leave or not against the judgment of acquittal, it is mandatory to the court to apply its mind.

In another case *Majjal* v. *State of Haryana*,[30]where the High Court of Punjab and Haryana on appeal on conviction under section 302 read with 149 of IPC summarily dismissed the appeal. The Supreme Court allowed special leave under article 136 due to the cryptic nature of the high court's observations on the merits of the case. It was found that the high court mentioned in its judgment all the facts in detail, names and numbers of the prosecution witnesses, particulars of all documents produced in the court and gist of the trial court's observations and findings. Even there was a reference to the arguments advanced by the counsel; however, without appraising the evidence, high court had dismissed the appeal. The reasons given by the high court were only in two short paragraphs. Therefore, the Supreme Court held that without assessing the evidence by the trial court giving a cryptic reasoning in a case where life imprisonment was awarded deserves a fresh hearing. This was justified by the apex court on two counts. One, the personal liberty of the accused is curtailed and second, the high court being the first appellate court in this matter, it merely concurred with the trial court's order without any support of reasons.

These two cases raises very fundamental requirement of reasoned decision. It is important to note that in spite of several judgments given by the Supreme Court mandating speaking orders, it is disturbing to see several high courts still pass orders casually. In number of cases, Supreme Court expressed its anguish over this practice. Speaking orders bring clarity. Justice demands the court to give reasons and reasons imply application of mind and serve the purpose of administration of justice, fair and reasonable. Absence of reasons results in tyranny and strikes at the very base of the cherished rule of just, fair and reasonable standard that is crystalized as a minimum guarantee by the Constitution of India against the rule of bias.

VII SUPREME COURT POWER TO DO COMPLETE JUSTICE: ARTICLE 142

Supreme Court is empowered to provide any remedy to do complete justice under article 142. Such a power is unfettered. Hence the question that was raised in *Manohar Lal Sharma* v. *Principal Secretary*[31] is whether the Supreme Court can monitor the investigation of CBI to provide complete justice?

The *Coal Gate* a popular term for the irregular allotment of coal blocks for extraneous considerations had rocked the country and resulted in CBI enquiry.

30 (2013) 6 SCC 798.

31 (2013) 6 SCC 616.

Several allegations were made of favoritism and nepotism. Even the Comptroller and Auditor General (CAG) in its performance audit on allocation of coal blocks estimated the loss to the public exchequer to the tune of about Rs.1.86 lakh crores. A CBI enquiry was ordered against these allegations and preliminary enquiries already registered to inquire into allegations of corruption against unknown public servants in the allocation of coal blocks for the period from 1993 to 2005 and 2006 to 2009. At this point the Supreme Court in larger public interest decided to monitor the inquiries/investigations being conducted by CBI and mandated the CBI to submit its reports about the progress of the investigation regularly to the court. However, the important question that was raised in this petition was whether the requirement of approval of the Central Government under section 6A of the Delhi Special Police Establishment Act, 1946 is necessary in this matter where the inquiry/investigation into the crime is being monitored by the court?

In support of approval of the Central Government, the attorney general submitted that section 6A being the procedure established by law to satisfy article 21, the court should not deny the same under article 32 or article 142. The requirement of sanction under section 6A cannot be waived even if the court monitors or directs an investigation. As a result, CBI cannot proceed with inquiry or investigation without fulfilling the statutory mandate of section 6A.

On the contrary, it was argued that the requirement of approval under section 6A is not necessary in court-monitored cases as mandatory following of such requirement would amount to restricting the power of a constitutional court. Such a restriction would severely dent the constitutional obligation of the apex court particularly when the abuse of public office for private gains has grown in scope and scale and hit the nation badly.

The approval of Central Government under section 6A is no doubt intended to give protection to the officers who are at the rank of joint secretary and above, from the malicious, vexatious petitions, inquiries and investigations. Such a protection is justified on the ground that the persons who are in the positions of decision making be protected from frivolous complaints. The approval of Central Government would act as a screening mechanism in cases of such misuse. But the moot question is whether such a mechanism is required even when the investigation is monitored by the constitutional court?

Answering the question in negative, the Supreme Court held that the constitutional courts are the custodians of justice and have been conferred with extraordinary powers of judicial review for the purpose of protecting the rights of citizens. Article 142(1) of the Constitution enables Supreme Court to pass such decree or make such order as is necessary for doing complete justice in any cause or matter. The true meaning of article 142 has been explained in several cases where in the Supreme Court consistently held that such power is plenary in nature.[32]

32 *Prem Chand Garg* v. *Excise Commissioner, U.P.*, 1963 Supp (1) SCR 885 and *A.R. Antulay* v. *R.S. Nayak*; (1988) 2 SCC 602.

The legal position articulated in *Delhi Judicial Service Association* case [33]is that the prohibition or restriction contained in ordinary laws cannot impose any limitation on the constitutional power of this court under article 142 and it has a power to issue any order or direction to do "complete justice" in the matter.[34] While quoting *Union Carbide Corporation* v. *Union of India*,[35] it observed that any ordinary law however important it may be or based on important public policy, cannot limit the power of the constitutional court under article 142. It was held: [36]

> The power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under article 142. Such prohibitions or limitations in the statutes might embody and reflect the scheme of a particular law, taking into account the nature and status of the authority or the court on which conferment of powers limited in some appropriate way is contemplated.

But a word of caution was expressed by the court that the powers under article 142 cannot be exercised in direct conflict of express provision of the statute. The proper way of exercising of such a power is to take note of the express prohibitions in any statutory provision and regulate the exercise of its power and discretion keeping in view the purpose of enacting such provisions.

The requirement under section 6A is intended to protect the higher officials from malicious and vexatious complaints. The court opined that if any such officer has reason to believe that he/she is being harassed by the CBI, then the Central Government or the officer have recourse to the court which is monitoring the inquiry/investigation. In the light of availability of such legal course to the category of officers, there is no need for mandatory approval under section 6A in court-monitored investigations and inquiries. Further, the argument of attorney general that section 6A is the procedure established by law for the purposes of article 21 and the court cannot deny the same even in exercise of powers under article 32 or article 142 could not be appreciated, as the constitutional court which monitors the inquiry/investigation could sufficiently check the misuses or abuses of power by CBI.

In the light of above judgment it is pertinent to note that in cases of such magnitude, the CBI needs protection from the unnecessary interference and

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33 *Supra* note 25.

34 See *State of U.P.* v. *Poosu*; [(1976) 3 SCC 1, *Ganga Bishan* v. *Jai Narain*; [(1986) 1 SCC 75, *Navnit R. Kamani* v. *R.R. Kamani*; [(1988) 4 SCC, 387.

35 (1991) 4 SCC 584

36 *Id*. at 83.

influence from the executive. CBI needs to be freed from extraneous influences so that it can be a non-partisan investigating agency. It is a well-known fact that in any criminal investigation, the court does not ordinarily interfere, this is more so in India as we follow adversarial system. However, in several extraordinary cases and in the interest of justice, Supreme Court and high courts have directed CBI to hold inquiry. In addition to passing such a direction, if the constitutional court decides to monitor the investigation, the approval of Central Government becomes redundant. However, one must understand that monitoring of investigation by the court does not mean supervising the investigation. Court monitoring would help in reducing the undue delay and bring fairness in investigation.

As a rule of caution, such a monitoring is done only in extraordinary circumstances and in exceptional cases keeping in view the larger public interest. This judgment would restore some faith in CBI, particularly in cases having political ramification in the country.

In another case *Shahid Balwa* v. *Union of India*,[37] a similar question was answered by the court. The 2G Spectrum Scam had rocked the country wherein mobile phone companies were allegedly given licenses at par below prices. CBI had lodged a first information report alleging that certain officials of the Department of Telecommucations (DoT) granted Unified Access Licenses to several mobile phone companies by misusing their official position and caused wrongful loss to the nation to the tune of about 22,000 cores. Subsequently, CBI registered a case under section 120B IPC, 13(1)(d) of the Prevention of Corruption Act against a former cabinet minister and others. Meanwhile, petition was filed before the Supreme Court requesting the Court to monitor the investigation by CBI.

The apex court after careful examination of the circumstances and various other factors including the report of the Central Vigilance Commission (CVC) and CAG agreed for monitoring the investigation. The court gave several directions to CBI and Enforcement Directorate for fair and impartial investigation and ordered to apprise the court of the various stages of investigation. Supreme Court also passed an order that since the investigation is monitored by the Supreme Court, no court shall pass any order which would in any manner interfere or hamper with the investigation. Such a stand was taken by the court in view that the request of monitoring was made by the appellants, prosecution agency and the Union Government. However, several writ petitions were filed before the Delhi High Court praying for stay of the trial proceedings on several grounds. Noticing these developments the CBI filed an application before the Supreme Court contending that entertaining cases by the high court would violate the order passed by the Supreme Court and requested the Supreme Court for summoning the records from Delhi High Court.

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37 2013 AIR SCW 5201.

This application was opposed by petitioner in the present case on the ground that these orders would violate the rights guaranteed to the petitioners under section 482 of the Cr PC and their right under articles 226 and 227 of the Constitution of India for moving to the high court. The contention was that since the remedies available under articles 226 and 227 under the Constitution have a wider scope, such a remedy cannot be taken away by passing an order by Supreme Court while monitoring the 2G scam. It was also contended that the Supreme Court can exercise power under articles 136 and 142 to monitor investigation but once the investigation is over and charge-sheet has been filed, the trial shall be left to the trial court.[38]

Further, the order of prohibiting other courts from entertaining any cases on 2G spectrum have the effect of negating the rights under article 226 and 227 by shutting out all remedies available to the parties under the Constitution of India to move to the high court. Previous judgments[39] of Supreme Court have clearly recognized that the rights conferred under articles 226 and 227 of the Constitution of India are the basic structure of the Constitution and as a result the jurisdiction of high court cannot be taken away by exercising powers under articles 136 and 142 of the Constitution of India.

After careful examination of the above submissions, the court held that the investigation by CBI and Enforcement Department is still continuing and the case that is already in trial before the special judge is one among other cases, therefore, the order was passed looking into the width and ambit of the case which requires investigation even in overseas. Passing of such order would not prejudicially affect the rights of the parties including the accused. It opined that if any one of the parties have any grievance, they are free to approach this court. The object behind such an order is to prevent any attempt to hamper the preemptory direction given by the Supreme Court to the special judge for day-to-day trial. Article 136 read with article 142 of the Constitution enables this court to pass such orders, which are necessary for doing complete justice in any cause or matter pending before it and, any order so made, shall be enforceable throughout the territory of India. Parties, in such a case, cannot invoke the jurisdiction under articles 226 or 227 of the Constitution or under section 482 Cr PC so as to interfere with those orders passed by this court, in exercise of its constitutional powers conferred under article 136 read with article 142 of the Constitution of India. Or, else, the parties will move courts inferior to this court under article 226 or article 227 of the Constitution or section 482 Cr PC, so as to defeat the very purpose and object of the various orders passed by this court in exercise of its powers conferred under article 136 read with article 142.

Serious concerns were expressed over several cases involving large scale corruption, that to by persons occupying high posts. The Supreme Court being the

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38 See *Rajiv Ranjan Singh 'Lalan' (VIII)* v. *Union of India* (2006) 6 SCC 613 and *Vineet Narain* v. *Union of India* (1996) 2 SCC 199.

39 *L. Chandra Kumar* v. *Union of India* (1997) 3 SCC 261 and *Shalini Shyam Shetty* v. *Rajendra Shankar Patil* (2010) 8 SCC 600.

guardian of the Constitution and protector of the rights of the people has a constitutional obligation to see that a fair and speedy investigation is conducted in the interest of larger public. Such a monitoring would ensure legitimacy and accountability in top investigating agencies in India. The timely resolution of cases of this magnitude is imperative for building public confidence in the legal system. Delay on flimsy ground would undermine the very purpose of rule of law which is a golden thread that runs deep in the fabric of Indian Constitution.

As the court rightly pointed out that article 139A enables the Supreme Court to transfer certain cases which involve substantial questions of law, from one high court to another or to itself, the contention that the order passed by the Supreme Court deprives the rights to adjudicate the grievances under articles 226, 227 or section 482 Cr PC before the high court, is untenable. Rise in demand for monitoring of the court, particularly on cases involving persons in influential positions indicates the public distrust in investigation and the accused persons' capabilities of derailing and delaying the investigation. Yet the justifiability of the court's monitoring role in investigations would raise serious challenges to the predominantly adversarial legal system that we have adopted. Court's role in such a legal system is expected to be neutral, unbiased and non-committal. Therefore, the apprehension that court's involvement in investigation would undermine such role is not unfounded. Nonetheless, the judicial pronouncements in *Vineet Narayan* and *Gujarat Communal Riots* cases dissipate such apprehensions as Supreme Court unequivocally said that once charge-sheet is submitted in the proper court, monitoring the investigation by the court would come to an end and it is for the trial court to take cognizance of the offence and deal with accordingly.

VIII CONDUCT OF GOVERNMENT BUSINESS: THE GOVERNOR'S ROLE: ARTICLE 166

Article 166 mandates that all the executive actions of state be expressly taken in the name of the Governor and as a result all the orders and the instruments executed shall in be in the name of the Governor. In *State of Bihar* v. *Sunny Prakash*[40] a compromise was arrived in the year 2003 between Bihar State University and College Employees Federation and the State Government of Bihar, regarding parity between the employees of the Constituent Colleges of the University and the state government. The state government sent the said agreement to the Vice Chancellors of all the Universities of the State of Bihar for necessary action. However, this agreement was not implemented and as a result several times strike was called by the Federation. In 2007 the compromise was reduced in writing. In spite of this, the terms of the agreement were not implemented. Hence, an indefinite strike was called by teaching and non-teaching staff of the universities. At that stage, a letter was written by respondent addressed to the chief justice of the high court requesting to end the strike. This letter was treated as a Public

40 (2013) 3 SCC 559.

Interest Litigation. The high court directed the Chief Secretary, Government of Bihar to ensure the commitment given by the state government to the Federation and to implement the same within one month. Further, it also directed the Federation to withdraw the strike immediately.

The only grievance of the state was that the agreement which was relied on by the high court was not executed in accordance with article 166 of the Constitution of India. Contention was raised that the execution of agreement on the part of the state government must be under the express name of the Governor and the same was not followed as per the requirements of article 166 of the Constitution.

The facts show that the final decision was taken by the minister concerned, various officers including HRD and finance departments, representatives of the federation and all other persons connected with the issue in question. In addition to it, directions were also issued to the Vice Chancellors and Registrars of all universities for implementing the said decision. Therefore, the Supreme Court held that, considering all these circumstances, the state cannot contend that it is not a government's decision in terms of article 162 read with article 166 of the Constitution. Supreme Court relied on several judgments and held that where a state had taken a decision, just because it is not expressly mentioned in the name of the Governor, cannot be a ground to declare it in valid under article 166.[41] The court held that it is a settled law that the requirement under article166 is merely directory and not mandatory. Therefore, even if the order is not expressly issued in the name of the Governor such an order would be valid and binding.[42] It explained that the compliance of the provisions of article 166 would give immunity to the order; however, noncompliance would not nullify the order.

In the present case, communications were sent by the higher level officers of the state government; therefore, there is no reason to reject those. Hence, when such commitments are made by the state government, the same have to be honored without any exception.

In *State of Gujarat* v. *Hon'ble Mr. Justice R.A. Mehta (Retd)*[43]appointment of lokayukta in the State of Gujarat became a political issue and raised myriad legal issues relating to constitutional interpretation. The Gujarat Lokayukta Act was enacted in the year 1986 and as per its provisions a retired judge of the high court could be appointed as lokayukta. The procedure for appointment is prescribed by section 3 according to which the Governor of the state could appoint lokayukta

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41 *State of Bihar* v. *Bihar Rajya M.S.E.S.K.K. Mahasangh* (2005) 9 SCC 129.

42 The court relied upon *Dattatreya Moreshwar Pangarkar* v. *The State of Bombay* 1952 SCR 612; *The State of Bombay* v. *Purshottam Jog Naik*, AIR 1952 SC 317 and *Ghaio Mall and Sons* v. *The State of Delhi* ((1959) SCR 1424.

43 AIR 2013 SC 1563.

upon consultation with the Chief Justice of the Gujarat High Court, and the leader of opposition in the house.[44] Section 3 (1) reads as under:

> For the purpose of conducting investigations in accordance with provisions of this Act, the Governor shall, by warrant under his hand and seal, appoint a person to be known as the Lokayukta. Provided that the Lokayukta shall be appointed after consultation with the Chief Justice of the High Court and except where such appointment is to be made at a time when the Legislative Assembly of the State of Gujarat has been dissolved or a Proclamation under Article 356 of the Constitution is in operation in the State of Gujarat, after consultation also with the Leader of the Opposition in the Legislative Assembly, or if there be no such Leader, a person elected in this behalf by the members of the Opposition in that House in such manner as the Speaker may direct

The vacancy for lokayukta had occurred in the year 2003.However, the chief minister after three years, requested chief justice to suggest the name of K.R. Vyas J for the post in the year 2006 and the same was approved by the chief justice. Thereafter, the chief minister forwarded the name of K.R. Vyas J to the Governor for his approval, and appointment. The file returned after three years citing the reason that Justice K.R. Vyas J had been appointed as Chairman of the Maharashtra State Human Rights Commission. In the year 2009, private secretary, to the Governor of Gujarat, sent a letter requesting the Registrar General of the High Court of Gujarat to send panel of names to be suggested by the chief justice for consideration of Governor for appointment to the post of lokayukta. Meanwhile, the chief minister also wrote a letter in the year 2010 to the chief justice requesting him to send a panel of names of three retired judges for the purpose of consideration to the post of lokayukta. Accordingly, the chief justice sent names of four retired judges. As per the requirements of section 3, the chief minister made an attempt to consult the leader of opposition, regarding names sent by chief justice. But the leader of opposition was reluctant to express his opinion on the ground that the chief minister had no right to initiate any consultation, with respect to the appointment of the lokayukta as it is the obligation of the Governor and the Governor had already initiated the consultation process.

The council of ministers went ahead in considering the names as recommended by the chief justice, and approved the name of J.R. Vora (Retd.) J and requested Governor to appointment him to the post of lokayukta. At this point of time Governor sought the opinion of the Attorney General of India, with regards the

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44 *Available at* : http:// centreight in/2012/04/gujrat-lokayukta-controversy-setting the recard. (last visited on Aug 24th, 2014)

nature of the process of consultation that is required to be adopted in the matter of appointment of the lokayukta. Based on the advice of the attorney general, the Governor requested the chief justice to send only one name.

After several deliberations finally the Governor requested the chief minister to expedite the process of appointing R.A. Mehta J whose name the chief justice also recommended. Even the leader of opposition also agreed for the appointment of R.A. Mehta J. However, chief minister wrote a letter to chief justice to consider certain objections raised by him against the appointment of R.A. Mehta J as lokayukta for which the chief justice found no reason to reconsider the decision. At this juncture, the Governor issued the requisite warrant from her office appointing R.A. Mehta J as lokayukta. The State of Gujarat filed a writ petition challenging the appointment before the High Court of Gujarat. In the high court the two judge bench hearing the case differed in their views and as a result the matter was referred to a third judge. After hearing the case the petition was dismissed.

The issues that were raised in this case were whether the Governor, being a nominal head of the state needs to adhere to the aid and advice of the council of ministers and can she correspond and consult with Chief Justice of the High Court of Gujarat directly? Is such a conduct of the Governor contrary to the principles of parliamentary democracy? Does the chief justice have to recommend a panel of names for consideration by the other consultees? Whether recommending only one name would result in converting the consultation into concurrence? Whether the Governor is justified in consulting with the Attorney General of India? As this appeal raises legal issues of great public importance, does it requires a reference to a larger bench?

Addressing the issue of referring to a larger bench, the court held that binding nature of its judgments under article 141 is to ensure certainty in interpretation of laws in the country. Therefore, reviewing its judgments on regular base would result in confusion as it would lead to uncertainty. Rarely this court may undertake a review of its judgments only when earlier decision was rendered erroneous and when the bench in unanimity feels it is completely justified. Reviewing the earlier decisions would depend on several considerations such as:

i. What is the nature of the infirmity or error on which a plea for a review and revision of the earlier view is based?

ii. On the earlier occasion, did some patent aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision?

iii. Was any previous decision of this Court bearing on the point, not noticed?

iv. Is the Court hearing such plea fairly unanimous that there is such an error in the earlier view?

v. What would be the impact of the error on the general administration of law or on public good?

vi. Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts?

vii. And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief?

Hence, before referring the case to a larger bench, the court must assess the correctness of the judgment delivered by it previously. The court opined that in the absence of such compelling circumstances in this case there is no need for reference to a larger bench.

The larger issue that needs to be answered with great caution in this case is whether consultation implies concurrence and thereby the opinion of the chief justice has primacy with respect to the appointment of the lokayukta. The issue of consultation and concurrence had been decided by the larger benches of Supreme Court in several cases pertaining to appointment of judges of high court and Supreme Court.[45]

A cumulative reading of its earlier judgments exhibits the court mandate that consultation means an effective and a meaningful consultation which involves exchange of material facts and points in order to arrive at a correct decision. It requires purposeful deliberations based on mutual discloser of material facts by each party. Further, the court relied on *Justice K.P. Mohapatra* v. *Sri Ram Chandra Nayak* [46] where in the provisions of the Orissa Lokpal and Lokayuktas Act, 1995 is *pari materia* with section 3 of the Act, 1986 the court held that the meaning of consultation need to be understood as concurrence. The reason for such an interpretation as explained by the court was that investigation by lokpal is quasi-judicial in nature and therefore, the chief justice of the high court would be the best person for proposing and suggesting a person for being appointed as lokpal. As he is in a better position to decide who could be more suitable for the said office, in this situation, primacy is required to be given to the opinion of the chief justice of the high court.

Thus, in view of the above, and in the present case, the provisions of the Act being verbatim replication of the Orissa Act, consultation need to be understood as primacy due to the fact that the Chief Justice of the High Court of Gujarat is in most appropriate position to judge the suitability of a retired judge, for the appointment of Lokayukta. Further, the object of the Act would not be achieved

45 See*Union of India* v. *Sankalchand Himatlal Sheth* AIR 1977 SC 2328; *Supreme Court Advocates-on-Record Association*; v. *Union of India*, AIR 1994 SC 268; *State of Kerala* v. *A.Lakshmikutty* AIR 1987 SC 331; *High Court of Judicature for Rajasthan* v. *P.P Singh* AIR 2003 SC 1029.

46 AIR 2002 SC 3578.

if the final decision is left in the hands of the executive. Therefore, the court held that the primacy of the opinion of the chief justice must be accepted and the term 'consultation' for such purpose shall mean 'concurrence'.

Further, the court justified its interpretation by saying that ordinarily, consultation means a free and fair discussion, revealing all material that the parties possess in relation to each other and then arriving at a decision. However, consultation would be read as concurrence in a situation by reading statutory provision and looking at the implications of the process. A careful look at some of the provision of the Act such as appointment under section 3 which contain mandatory consultation with the chief justice, section 6 which provides for the removal of lokayukta, inquiry that needs to be conducted by the chief justice or his nominee with respect to specific charges and section 8(3) which provides for recusal of the lokayukta in a matter where a public functionary has raised the objection of bias, and whether such apprehension of bias actually exists or not, shall be determined in accordance with the opinion of the chief justice, shows active involvement of the chief justice as a result, the statutory construction mandates the supremacy of chief justice.

Relying on *Ashish Handa* v. *Hon'ble the Chief Justice of High Court of Punjab & Haryana* [47] and *Ashok Tanwar* v. *State of H.P* [48]the Supreme Court decided that the chief justice shall send only one name as sending a panel of names for consideration would result in loss of its primacy and have the effect of giving primacy to the Governor over the appointment.

With regards to the role of Governor, it is well settled law that the Governor is bound to act only in accordance with the aid and advice of the council of ministers, headed by the chief minister.[49]Consequently, wherever the Constitution requires the satisfaction of the Governor, such satisfaction is not his personal satisfaction but of the council of ministers as contemplated in a cabinet system of government. As a matter of constitutional governance, the Governor shall act with aid and advice of the Council of Ministers, except in exceptional situations expressly mentioned by the Constitution. In view of such constitutional limitations on the power of the Governor, the power to appoint the lokayukta must be exercised only on the advice of council of ministers. This is so even such a power was not governed by any specific rule in the rules of executive business as rules cannot override any bar imposed by article163(3) of the Constitution. However, the court cautioned that it is not to say that Governor cannot act on his own accordance. Such a situation shall be either contemplated by the Constitution itself or when the Governor ex-officio, becomes a statutory authority under some statute.[50]

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47 AIR 1996 SC 1308.

48 AIR 2005 SC 614.

49 In *Samsher Singh* v. *State of Punjab*; AIR 1974 SC 2192, *M.P. Special Police Establishment* v. *State of M.P.* AIR 2005 SC 325; *State of Maharashtra* v. *Ramdas Shrinivas Nayak*, AIR 1982 SC 1249.

50 See *Hardwari Lal* v. *G.D. Tapase* AIR 1982 P & H 439.

In the present case, the court held that the Governor has misjudged her role by saying that the council of ministers has no role to play in the appointment of the lokayukta, and that she could appoint the lokayukta in consultation with the Chief Justice of the Gujarat High Court and the leader of opposition. Such an approach is not in conformity with the idea of parliamentary democracy. Governor could take independent action in her own discretion only when a statute confers such authority or under the exception(s) provided in the Constitution itself. As there is no such authority given to her by the state legislation, the appointment of the lokayukta can be made by the Governor as the head of the state, only with the aid and advice of the council of ministers. Therefore, consultation with Attorney General of India for legal advice, and communication with the Chief Justice of the Gujarat High Court directly without aid and advice of the council of ministers, is not in consonance with Constitution.

However, the court said that in the light of the facts of the case it is clear that the chief minister had full information and all communications from the chief justice were sent to chief minister. The recommendation of chief justice suggesting only one name, instead of a panel of names, is in consonance and there is no cogent reason to not give effect to the said recommendation. Further, Section 3 allows the Governor to appoint lokayukta in the absence of council of ministers due to dissolution of legislative assembly or during the proclamation of emergency under article 356 to avoid any delay in appointment. But in the present case, the lokayukta post has been lying vacant for a period of 9 years and the court felt that the process of consultation stood complete as chief justice provided an explanation to the chief minister regarding the objections raised by him over the appointment of R.A. Mehta J. It was also observed that in the initial stages the chief minister expressed his opinion as regards the supremacy of the chief justice but later expressed his inability to accept the name recommended by the chief justice. As it is already decided that the chief justice has primacy of opinion in the appointment of lokayukta the non-acceptance of recommendations by the chief minister, remains insignificant.

The court finally held that the Governor, under section 3 of the Act, has acted upon the aid and advice of the council of ministers considering the fact that section 3 of the Act, 1986, does not envisage unanimity in the consultative process and all the deliberations are within the knowledge of the chief minister. As a result the appointment was upheld.

It is interesting to see whether this judgment fortifies the judicial diktat of monopolizing not only judicial appointments but also other appointments where and when consultation was warranted by the statute. It has an impact of undermining any genuine consultative process. The consultative process that was interpreted by the Supreme Court is not the process contemplated by the Constitution framers. In majority of the countries in the world, executive exercises the power of appointment of judges. The judgment makes the judiciary the vanguard of judicial independence. However the question that needs to be answers is, whether judicial independence means only structural independence from executive like in terms of

appointment or is it much more. How to address other aspects of independence such as impartially, accountability, transparency, avoiding improper influences, inducements, pressures, threats or interferences, and standards of services. In view of strong public confidence in the administration of justice, judicial independence must focus more on adjudicative independence *i.e.,* the ability of the courts to perform their judicial functions without interfere from the government.

The opacity in which the judiciary works in appointment of judges became a bone of contention right from the judgment of *Supreme Court Advocates on Record Association* case. Though the chief justice is in a better position to recommend the name and if his recommendation had supremacy, there is no reason for long consultation process that is required to be undertaken in appointment of lokayukta. It cannot be said that the choice of the judiciary could not be found fault with as previous instances of recommending names of persons having serious allegations against the integrity proves otherwise. Conferring supremacy against the legislative intent and overlooking the role of the Governor which is in blatant violation of constitutional norms and conventions would set a wrong precedent however necessary such an interpretation is required in the interest of public. Usurping the power on ground of failure of executive in appointment would not be justified. Strengthening one organ to tackle the deterioration of standards in another organ of the government is not the answer. If the same trend continues, it is plausible that judiciary would become another organ of the state, thereby shattering the hopes of a billion.

IX APPOINTMENT OF HIGH COURT JUDGES: ARTICLE 217

Appointment of judges to the higher judiciary is a task that requires highest scrutiny. The collegium system was envisaged by the Supreme Court keeping in mind the importance of independence of judiciary. However, that would not preclude the court from judicial review over the appointments. In *M. Manohar Reddy* v. *Union of India*,[51]two advocates of the High Court of Andhra Pradesh, filed a petition in public interest challenging the appointment of N.V. Ramana as a judge of the High Court of Andhra Pradesh and asked for issuing the writ of *quo warranto* to quash the appointment and also a writ of *mandamus* directing the Bar Council of Andhra Pradesh to cancel his enrolment as an advocate. The ground on which the writs were sought was that, at the time of his appointment as a judge of the high court, a criminal trial was pending and the same was not brought to the notice at the stage of consultation by the high court and the Supreme Court Collegium as well as the Central Government. In the said criminal case, N.V. Ramana is not only an accused but also a proclaimed offender. It was also contended that even at the time of enrolment as an advocate he had concealed the criminal proceedings and stated that there was no criminal case pending against him. Upon the verification it was found that the said criminal proceedings were initiated in

51 AIR 2013 SC 795.

1981 when the respondent was a student and participated in an agitation for improving the public transport facilities for the students of the University.

Upon the examination of the court record, it is evident that right from the year 1981 when the case was initiated service of summonses was not effected. Although a proclamation under section 82 and 83 of the Cr PC was ordered to be issued, the court record shows no attempt of publication and further nothing on the record indicates any attempt to serve the summons to the respondent.

The question that arises is, when a criminal case is pending at the time of appointment, failure to take the same into account while the name is recommended by the high court collegium and approval by the Supreme Court Collegium and the Central Government would vitiate the participatory consultative process as envisaged in article 217(1) of the Constitution of India? If so, can a writ of *quo warranto* be issued to quash appointment of the judge, particularly when express provisions were made constitutionally for removal of the judges?

It was contended by the respondent that the writ petition was not maintainable, as issuing the writ of *quo warranto* quashing the appointment of high court judge would amount to a camouflage and that to when the judge has already been in office for over twelve years. The Constitution of India made elaborate procedure under articles 124 and 217 for removal of judges in office, with a view to maintain the independence of judiciary. The idea behind such an elaborate procedure is to enable the judges of the higher judiciary to perform their duties without fear or favour. Further, this being the only method of removing the judges of Supreme Court and high court, issuing writ of *quo warranto* to quash the appointment would amount to deviation from the Constitutional process.

While deciding the power of judicial review over the appointment of judges of higher judiciary, relying on *Shri Kumar Padma Prasad* [52] and *Mahesh Chandra Gupta* [53] cases, the apex court made a clear cut distinction between eligibility and suitability and pointed that the eligibility is based on facts whereas suitability belongs to the opinion. Therefore, the eligibility of the candidate for the post of the high court judge could be judicially reviewed but the suitability is not amenable to judicial scrutiny. The court also opined that the appointment of high court judges could be reviewed only on two grounds (i) lack of eligibility and (ii) lack of effective consultation. The ground of lack of eligibility would enable the court to exercise its jurisdiction to issue writ of *quo warranto* as the eligibility is not a matter of subjectivity. However, writ of *quo warranto* could not be available on ground of suitability of a person to the post of judge of high court, as suitability would be judged based on his character, integrity and competence which are like matters of opinion.

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52 (1992) 2 SCC 428.
53 (2009) 8 SCC 273.

This being settled, the only question that needs to be answered is in which category N.V. Ramana's appointment falls and whether it is open to judicial review? The facts of the case make it evident that the challenge in this case squarely falls in the second category. In *Centre for PIL* v. *Union of India*,[54]the appointment of CVC was struck down for lack of effective consultation by a three judge bench of Supreme Court. In this case it was held that the recommendation for appointment of P.J. Thomas as Central Vigilance Commissioner was non-est in law because the HPC had failed to take into consideration the fact of pendency of case against P.J. Thomas.

However, the apex court made a distinction between P.J. Thomas and N.V. Ramana. It was rightly held that the fact about the pendency of the criminal case against P.J. Thomas was writ large all over the record before the HPC and also in the public domain. Further, the fact was also within the personal knowledge of each of the three members of the HPC and the candidate himself. Therefore, it appears that the committee did not see a pending criminal case as an impediment in the way of his appointment as the Chief Vigilance Commissioner. But in Shri. N.V. Ramana case neither the collegium nor the Central Government had any knowledge. From the record of the case it is very difficult to say that the candidate was even aware that he was named as an accused and he was required to appear in the court in connection with that case.

Further, the petitioners before filing a petition brought these facts to the notice of Chief Justice of India and the law minister. After receiving a detailed report from Andhra Pradesh High Court, the high court opined that the candidate was unaware of the pendency of the criminal case. Therefore, a fact that is unknown to anyone could not be considered to flaw the consultative process. If such a conclusion could be drawn it would result in uncertainty in the appointments. It is also to be noted that the incident happened about 30 years ago and the case was withdrawn about 10 years ago and racking this case seems not a sincere and honest endeavour to correct something wrong. Therefore, the petition was dismissed and the court upheld the appointment.

Independence of judiciary is a back bone of any democracy. Fearless judiciary is a hall mark of modern constitutional philosophy. Appointment and removal of the judges is the most integral part of such independence and any attempt of interfere except as provided by the Constitution would devoid the very edifice of judiciary. Insulating the judiciary from such attempts is the need of the hour keeping in view the faith reposed in the judiciary by the citizens of India.

X SCOPE OF WRIT JURISDICTION OF HIGH COURT: ARTICLE 226

Jurisdiction of high court under article 226 is invoked in myriad situations. However, the problem of interpretation without causing destabilization of the Constitution is perennial in nature. Recognizing the thin line between constitutional

54 (2011) 4 SCC 1.

engagement and its abdication, judiciary needs to play a delicate yet decisive role in promoting both rule of law; and democracy. Several cases that came before the judiciary in the year of this survey reflect this role.

In *Bangalore Development Authority* v. *M/s Vijaya Leasing Ltd.*,[55] the issue that was raised was whether a high court under article 226 of the Constitution can correct errors which are apparent on the face of the record even though they are not specifically challenged by the party. Answering in affirmative the Supreme Court held that high court's order could be justified in exercise of power and jurisdiction under article 226 of the Constitution. To support this view the Supreme Court heavily relied on two of its previous judgments[56] wherein it was held that the language used in article 226 confers wide power on the high court to reach injustice. The widely construed language of article 226 connotes that the power to issue prerogative writs though comparable with those in England, the expression 'nature' does not equate with writ jurisdiction in England. It opined that article 226 enables the high courts to shape reliefs to meet the specific requirements of this country.

In *Doliben Kantilal Patel* v. *State Of Gujarat* [57]two important questions were raised before the Supreme Court on the power of high court. First, if the officer in-charge of a police station failed to register a complain as an FIR under section 154, can the applicant approach the high court asking the court to issue directions to register the FIR and investigate the same? Second, what are the powers of the high court in ordering for investigation by the CBI? In the present case the appellant, an American Citizen of Indian origin was arrested at about midnight under sections 406, 409, 420, 465, 467, 468, 174, 120B and 477A of the IPC and was produced before the judicial magistrate. On the very same day, the judicial magistrate granted remand for a period of 5 days. Appellant filed a complaint under section 376 read with section 120B of the IPC to the police inspector alleging that from the very first day of remand, she was repeatedly raped in the police custody. However, she refused to give any statement before the police inspector, Mahila Police Station.

Being aggrieved by the non-filing of FIR, the appellant approached the Gujarat High Court praying for a direction to the authorities concerned to register an FIR and also to refer the matter to the CBI for investigation. On dismissal of the application by the high court, the appellant approached the Supreme Court under article 136 by way of special leave petition (SLP).

Relying on the *State of Haryana* v. *Bhajan Lal*,[58]the court held that in case of any grievance that the complaint has not been registered as FIR, the Cr PC provides

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55 AIR 2013 SC 2417.

56 *Dwarakanath* v. *Income Tax Officer* -1965 (2) SCJ 296 and *Gujarat Steel Tubes Ltd.* v. *Gujarat and Steel Tubes MazdoorSabha* 1980 (2) SCC 593.

57 AIR 2013 SC 2640.

58 1992 Supp (1) SCC 335.

a remedy by allowing the complainant to make an application to the Magistrate having jurisdiction. Therefore, high court was justified in directing the appellant to avail the recourse to the remedy as provided in the Cr PC by filing a complaint before the magistrate.

With regard to the direction for investigation by the CBI, the Supreme Court held that in spite of wide powers conferred under article 226, over the period of time the judiciary had developed several self-imposed limitations. Therefore, an order for investigation by the CBI cannot be passed as a matter of routine or merely because a party has leveled some allegations against the local police. It was held in: [59]

> This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise, the CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations.

A similar observation was also made by the Supreme court in another case *Alsia Pardhi* v. *State of M.P.*[60] However, in dealing with the question, whether entrusting the investigation to the CBI in respect of a cognizable offence when the state has already initiated enquiry through its agency would violate the principles of separation of powers, the court held that when entry 2 of list II, entry 2- A and entry 80 of List I confers the power on the state and Union respectively to entrust another agency to investigate, there is no reason why the court would be prevented from exercising the same power in extraordinary circumstances. Exercising such powers would not violate the doctrine of separation of powers. Further, it held that if the court fails to grant relief in such situations, it would amount to failing in its constitutional duty.

In *Indian Soaps & Toiletries Makers Association* v. *Ozair Husain*,[61]the decision by the Delhi High Court in a PIL that the consumer has a fundamental right to know whether cosmetics and drugs are of non-vegetarian or vegetarian origin and hence same needs be expressly mentioned on the packages with a specific symbol was challenged. The Supreme Court was asked to decide on the following two important questions:[62]

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59 See *West Bengal* v. *Committee for Protection of Democratic Rights, West Benga*l, (2010) 3 SCC 571.

60 2013 STPL (Web) 972 SC.

61 AIR 2013 SC 1834.

62 *Id.* at 1838

(i) Whether under Article 226 of the Constitution of India the High Court has jurisdiction to direct the manufacturers of drugs and cosmetics to display a particular symbol in their packages to identify the ingredients of non- vegetarian or vegetarian origin? and

(ii) Whether it is practicable and desirable to display any identification as to the origin of the non-vegetarian ingredients in the packages of drugs and cosmetics?

In *A.K. Roy* v. *Union of India*,[63] the apex court held that a writ of *mandamus* cannot be issued calling upon the Central Government to discharge its duty by bringing legislation into force. A similar conclusion was also drawn by Supreme Court in *Supreme Court Employees Welfare Association* v. *Union of India* [64]wherein it was held that:[65]

> ... [T]here can be no doubt that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which he has been empowered to do under the delegated legislative authority.

Further, in *Bal Ram Bali* v. *Union of India*,[66] a plea to enforce total ban on slaughter of cows, horses, buffalos and camels was rejected on the ground that it is a matter of policy of the appropriate government and the court cannot issue any direction to Parliament or to the State Legislature to enact a particular kind of law. The Indian Constitution expressly confers such a power to enact laws on legislature; therefore, no other authority could direct the legislature to enact a particular legislation.[67]

However, the appellant's contention that, in *Union of India* v. *Association for Democratic Reforms*,[68] the Supreme Court held that when a field has been remained unoccupied, court can issue such direction under article 32 of the Constitution of India was rejected as in this case the field has not remained unoccupied as these questions were deliberated by the Central Government. Subsequently the same matter was referred to the Drug Technical Advisory Board and the board rejected the said suggestion.

Therefore, Supreme Court rightly held that the high court under article 226 of the Constitution of India has no jurisdiction to direct the executive to exercise

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63 (1982) 1 SCC 271.

64 AIR1990 SC 334.

65 *Id*. at 26 353.

66 (2007) 6 SCC 805

67 *Union of India* v. *Prakash P. Hinduja*, (2003) 6 SCC 195.

68 (2002) 5 SCC 294.

power by way of subordinate legislation pursuant to power delegated by the legislature to enact a law in a particular manner.

In yet another case *Prof. A. Marx* v. *Government of Tamil Nadu*,[69] the Supreme Court reiterated the same principle. In this case the petitioner approached Madras High Court to issue direction for extending the constitutional benefits of reservations and also directing the teachers' recruitment board by assigning minimum qualifying cut off marks for each communal category, in accordance with the prevailing reservation rule. The Madras High Court refused to grant the reliefs on the ground that it is a policy matter to grant or not to grant relaxation/concessional marks to the reserved categories, hence it is the prerogative of the state government. Further, it was also held that under article 226 of the Constitution, the court cannot give positive direction to the State to reduce the minimum marks to any reserved category. The said ruling was challenged before the Supreme Court claiming that fixing 60% as uniform qualifying marks for all categories is illegal and is violative of article 16(4) of the Constitution of India. However, it upheld the decision of Madras High Court and held that it is the prerogative of the state government to decide whether the cut off marks stipulated for the reserved category candidates have to be reduced or not. It is the state authorities who after considering variety of factors, would fix the cut off marks and court cannot substitute its views to that of the experts.

The fundamental question that was raised before Kerala High Court in *Vibin P. V.* v. *State of Kerala*,[70]was whether a victim of police torture can approach high court under article 226 for compensation when such a remedy is already available under civil and criminal law. Answering in positive the Kerala High Court held that it can grant compensation while exercising the jurisdiction under article 226 notwithstanding the right available to the victim under civil and criminal proceedings. Further the contention of the respondent that the action was undertaken by the Home Guards who are not permanent employees of the state, hence the government is not vicariously liable was also rejected and it was held that the Home Guards are acting under the police force and exercises the same powers as of the regular police. Hence, their status as employees comes under the expression of public servant. The act was done by the Home Guards in the course their employment; hence the government is vicariously liable.

In *State of Punjab* v. *Salil Sabhlok*,[71]the respondent filed a public interest litigation under article 226 of the Constitution before the Punjab and Haryana High Court seeking *mandamus* directing the state government to frame regulations to govern the conditions of service and appointment of the chairman and/or the members of the Public Service Commission as envisaged in article 318 of the Constitution of India. He also prayed before the court that the present appointment of Chairman of the Public Service Commission must be restrained in the absence

69 2013 STPL (Web) 1007 SC.

70 AIR 2013 Ker.

71 (2013) 5 SCC 1.

of any guidelines. The division bench held that persons to be appointed as Chairman and members of the Public Service Commission must have competence and integrity. Therefore, the question is how such persons are to be identified and selected for appointment as Chairman of the Public Service Commission. The bench decided that this question needs to be addressed by a higher bench and hence referred the matter to the bench of three judges of the high court.

Pursuant to reference made by the division bench, the chief justice of the high court constituted a full bench and the full bench while deciding the cases directed both Punjab and Haryana Government to frame the procedure for appointment as members and Chairman of the Public Service Commission which shall be fair, rational, objective and transparent policy to meet the mandate of article14. Further, the bench has also given a detailed procedure for appointment and directed the states that till the procedure is made, they shall follow this procedure.

The question that was raised before the Supreme Court in an appeal was whether the high court in exercise of its writ jurisdiction under article 226 of the Constitution can lay down the procedure for the selection and appointment of the chairman of the state public service commission and quash his appointment in appropriate cases?

Supreme Court answering the question in negative and held that it is already a settled law that as per the Constitution of India it is for Parliament to frame the guidelines or parameters regarding the qualifications, experience or stature for appointment as Chairman/Members of the Public Service Commission and hence it was not necessary for the division bench to make a reference to a full bench on the very same question of law. Prescribing the qualifications and procedure to be followed in appointing requires expertise in the field and as such the expertise is neither available with the court nor it is in accordance with the constitutional scheme. The court should not undertake such a task and the same cannot be infused into article 316.

Thus the court rightly held that article 316 of the Constitution not only expressly confers the right of appointing the Chairman and other members of Public Service Commission on the Governor of a state but also confers an implied power to lay down the procedure for appointment. As a result the high court cannot under article 226 of the Constitution usurp this constitutional power of the government and lay down the procedure for appointment of the Chairman and other Members of the Public Service Commission.

The Constitution of India envisages separation of powers as one of its cardinal principles in constitutional governance. However, the power of judicial review under article 13 provides an opportunity to the judicial engagement. But articles 122 and 212 also recognize judicial abdication. Therefore, the concept of 'Living Constitution'[72]cannot allow the judiciary to usurp the power of the legislature. It

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72 Living Constitution envisages constitution as an organic document which grows with the passage of time through amendments and judicial interpretation.

may have the effect of nullifying the very idea of democracy. This is not to say that the judiciary should be a mute spectator, constitutional aspirations of socio economic justice and enhancing the constitutional provisions for social betterment requires a proactive role from judiciary. Balancing these interests, the Supreme Court has shown greater maturity particularly by a self-imposing judicial restraint in policy matters by clearly indicating that such a power is vested in the legislature and the executive which has expertise in deciding such complex matters.

XI HIGH COURT POWER OF SUPERINTENDENCE OVER ALL COURTS: ARTICLE 227

The power of the high court under article 227 of superintendence over subordinate judiciary was questioned in *Kamlesh Kumar* v. *State Of Jharkhand*.[73]In this case several cases were filed against the petitioners before the Chief Judicial Magistrate Ranchi for violation of Foreign Exchange Regulation Act, (FERA). In addition the petitioners were also offenders in cases which were pending before the special judge in the fodder scam. Further, many of the documents that were relied upon and the witnesses to be examined were being common; a request was made to the state government to transfer the cases under FERA to the same special court for convenience. Based on the request, the Law Secretary of the Government of Jharkhand wrote to the registrar general of the high court and accordingly the Jharkhand High Court passed a resolution empowering the special judge to try the cases of FERA (now FEMA).

As a result the petitioners challenged the transfer before single judge of the Jharkhand High Court at Ranchi which was dismissed. The question which arose in the present case was whether the high court has power to transfer the case? Answering the question in affirmation the apex court held that the high court does have the power to transfer the cases under section 407 of the Cr PC section 407 (1) (c) of CrPC empower the court to transfer a case for trial for general convenience of the parties or witnesses, or where it is expedient for the ends of justice. Further, the high court also can transfer cases by exercising its administrative power of superintendence under article 227 of the Constitution of India. It opined that as long as the power to transfer does not prejudicially affects the rights and interests of the parties and is exercised for administrative exigency; there is no reason to interfere with the decision of high court to transfer the cases. Section 407 Cr PC read with article 227 and 235imples that there is no hesitation to hold that the high court has power to transfer the cases either on the administrative side or on the judicial side.

XII APPOINTMENT OF JUDGES TO THE LOWER JUDICIARY: ARTICLE 233

Article 233 deals with the appointment of judges to the lower judiciary. The important question that was raised in *Lakshmana Rao Yadavalli* v. *State of Andhra*

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73 2013 AIR SCW 5952.

Pradesh[74]was whether persons working as assistant public prosecutors are entitled to be appointed as judges of Sessions Court? One of the qualifications to be eligible for the post of judge of Sessions Court is being an advocate having standing of seven year at the Bar. The contention that assistant public prosecutors are in fulltime employment with the state government and one of the candidates had not completed 35 years at the time of advertisement of the posts, were accepted by the high court and it quashed the appointment. In an appeal the Supreme Court after relying on its earlier judgment in *Deepak Aggarwal* v. *Keshav Kaushik*[75] held that the question whether a public prosecutor/assistant public prosecutor/district attorney/assistant district attorney/deputy advocate general, would cease to be an advocate within the meaning of article 233(2) of the Constitution of India was answered already by saying that they would be treated as practicing advocates and eligible for judicial positions. Therefore, there is no confusion regarding their eligibility. The ratio of the above judgment is that an assistant public prosecutor is also an advocate practicing at the Bar and hence would be eligible for the post. As far as 35 years of age is concerned there is no such requirement that the candidate should necessarily complete 35 years of age for being appointed to the post of a District and Sessions Judge in State of Andhra Pradesh. The appointment rules framed by the Andhra Pradesh High Court do not provide for any minimum age. The said requirement is only a recommendation by *Shetty* Commission. Therefore, the judgment of the high court was quashed.

In *K.Vijaya Lakshmi* v.*Govt.Of A.P.Tr.Sec.Home*,[76]the appellant an advocate, was selected for the post of junior civil judges. Her name was listed at serial no. 26 of the selected candidates list. However, she did not receive any appointment letter, though the other candidates were issued letters. On an application under The Right to Information Act, 2005, she had come to know that she could not get appointment order due to adverse remarks in verification report to the affect that her husband had close links with CPI (Maoist) Party, a prohibited organization.

She filed a writ petition in the High Court of Judicature of Andhra Pradesh, seeking writ of *Mandamus* to declare that the non-inclusion of her name in the list of junior civil judges was illegal, arbitrary and in violation of article 14 of the Constitution of India and prayed to issue a direction to the Government of Andhra Pradesh directing the order of appointment.

In response to the writ petition, the respondents submitted an affidavit that not only the Petitioner's husband but the Petitioner too had close links with the CPI (Maoist) Party. After verification of the materials placed before the division bench, the court held that no judicial review could be exercised on matters where the state enjoys prerogative power and expressed its inability to interfere by stating that it is the appointing authority which has to decide the suitability of the candidate

74 2013 STPL (Web) 975 SC.

75 *Deepak Aggarwal* v. *Keshav Kaushik* 2013(1) SCALE 564.

76 AIR 2013 SC 3589.

for appointment and once the appointing authority finds that the concerned candidate is not fit for judicial post, the court is not expected to interfere in that decision.[77] Aggrieved by the decision of the Andhra Pradesh High Court an appeal was preferred before the Supreme Court.

Though the appeal is concerned with the question as to whether the governments of Andhra Pradesh and the high court have proceeded correctly in the matter of appointment of the appellant, the most important concern is the role of high court in appointment of subordinate judges. It appears from the facts that the decision not to appoint the Appellant was taken by the Government of Andhra Pradesh and before taking such a decision no consultation with the high court was considered. Article 234 of the Constitution deals with the recruitment of persons other than district judges.[78] As Article 234 expressly mandates a consultation with both, state public service commission and the high court, when an adverse report had been received by the government, it is a constitutional obligation on the part of the government to forward the report and consult with high court. Once the relevant reports are placed before the high court, it may accept the adverse report or it may not. It is a constitutional mandate that the Governor must be guided by the high court in selection of candidates for the appointment to a judicial post.

Articles 233 to 235 of the Constitution safeguard the independence of the subordinate judiciary. A meaningful consultation under article 234 requires the high court to take a decision on the suitability of a candidate and it cannot simply go by the police reports, though such reports will, of course form are levant part of its consideration. Police report regarding political affinity could not be the sole ground on which a candidate be denied public employment. It is therefore the duty of the high court to assess whether the candidate's affinity towards a particular organization could possibly affect the integrity and efficiency of the candidate and whether there is sufficient evidence to that effect.

Further, the apex court also pointed, that once a candidate is selected to the post of civil judge, she remains on probation for a period of two years. Therefore, the district judges and the high court have sufficient opportunity to assess the performance and if they are not satisfied, the probation of the candidate could be extended and finally if found unsuitable or engaging in activities not behoving the office, the candidates can be discharged from the post. The court set aside the judgment of the high court and directed the government of Andhra Pradesh to submit all the relevant reports within two weeks before the high court for its

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77 High court placed its reliance on *Union of India* v. *Kali Dass Batish* 2006 (1) SCC 779.

78 Art. 234: Recruitment of persons other than district judges to the judicial service. Appointment of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

consideration. Further, the selection committee of the high court shall consider all the relevant materials including the explanation by the appellant and take the appropriate decision within four weeks.

In view of this judgment it is clear that the power of the governor in appointment of judicial posts is controlled by the consultation with the respective high courts. One of the reasons for such a condition is that the high court is in a better position to assess the suitability of a candidate. As a result, the consultation with the high court cannot be an empty formality. Such a measure enhances the independence of the judiciary. It is important to note that the independence of the lower judiciary is as important as higher judiciary and in fact, lower judiciary may be much more important, considering the fact that they have a better reach to the common people.

XIII REPUGNANCY: ARTICLE 254

Legislative domains of both Central and state governments have been expressly fixed by the Constitution. In addition to it, several mechanisms have been created by the Constitution to avoid the conflict between state and Central legislations. Judiciary is given the task of resolving such conflicts. In *Association of Management of Private Colleges* v. *All India Council for Technical Education*,[79] one such situation had arisen. The appellant colleges affiliated to Bharathidasan University and some of them affiliated to Manonmaniam Sundaranar University in the State of Tamil Nadu were running Arts and Science courses. Most of them were offering MCA course with the approval from the respective universities. However, they had not obtained any approval from All India Council for Technical Education (AICTE) whereas other institutions had obtained the approval from AICTE. In 1997 the AICTE amended its Regulations 1994 and the new rule 2(2) excluded the regulations of AICTE for post graduate course of MBA and MCA courses. But in the year 2000 the said Regulation 2(2) was deleted and the regulations were made applicable to both MBA and MCA. Several notifications issued by the AICTE cover wide aspects of governance of the colleges such as, governing body of the colleges, land area, staff, salary, and guidelines for Common Entrance Test(s) for admission to MCA Programmes. These notifications having the force of displacing the UGC norms, would go against the general administration by the University under Bharathidasan University Act, 1981. The control over the affiliated colleges is normally exercised by the parent University to which they are affiliated. However, the AICTE Rules made certain type of courses subject to their control. As a result, state legislation upon which the university is established would have a direct conflict with the rules and regulations that were made by AICTE.

If there is conflict between the state legislation and the Central legislation, the state legislation being repugnant to the Central legislation would be inoperative under clause (2) of article 254 of the Constitution. The AICTE Act was enacted

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79 AIR 2013 SC 2310.

by the Parliament in 1987 under entry 66 of Union List and the Bharathidasan University Act, 1981 enacted by the state legislature under entry 25 of the Concurrent List. As a result, the Bharathidasan University Act would be repugnant to the AICTE Act and inoperative to the extent of its repugnancy.

Right from the beginning of the Constitution, the higher education and technical institutions has been in the domain of the Union under entry 66 of list I. Even before the Forty Second Amendment entry 11 of list II with regard to higher education is subject to entry 66 of list I. After the Forty Second Amendment, entry 11 of list II was though kept under entry 25 of list III, no significant change took place as it is still subjected to entry 66 of list I.[80] Though there is no doubt about the legislative competence of Parliament over technical institutions, the contention was that under entry 66, the Parliament lay down the minimum standards but it would not deprive the state legislature from laying down standards above the said minimum standards.

In this regard the Supreme Court after relying on Bharathidasan University and Parshvanath Charitable Trust cases pointed that the role of the AICTE is to ensure a uniform pattern for design and scheme of technical education in India. It also intended to bring uniformity in standards and remove the disparities in offering technical education in India. The principle role of AICTE Act is only advisory in nature and is necessarily restricted to send report or make suggestions to the UGC to maintain standards in technical education and also to see that there shall be uniform education standard throughout the country. Therefore, implementation of the provisions of the AICTE Act shall be the responsibility of UGC as the universities and its affiliated colleges are all governed by the provisions of the UGC Act. As Parliament expressly excluded Universities from the definition of technical institutions under the AICTE Act, it is clear that the same rule would apply to affiliated institutions of the universities. Further, it was also held that in view of express provision that all the regulations passed by the AICTE required to be place before the Parliament, without fulfilling such requirement, the regulation passed by AICTE would not take effect.

Though education in many developed countries is left to the private entrepreneurs, education in India continued to be one of the prime responsibilities of the state due to peculiar socio-economic conditions prevalent in India. Nevertheless, the role of the private educational institutions could not be ignored keeping in view the hard realities. Realizing the fact that state is not in a position to meet the growing demand of higher education particularly in technical field, private institutions were allowed to enter into the education field. Keeping the demands of the large students' population and importance of education in social progress, several measures for brining uniformity in the standards becomes a

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80 Entry 25 of List III: Education, included technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of list I; vocational and technical training of labour.

herculean task for the state. As a result, several central legislations were enacted to monitor the standards of educational institutions offering higher education. State needs to balance the autonomy of the institution and monitoring of quality of education offered by the institutions. The judgment precisely does this precarious act efficiently by balancing the power of AICTE with the autonomy of the university and its affiliated colleges.

Lalita Kumari v. *Govt. of U.P.*,[81]raises the issue whether it is mandatory for the police officer to register a First Information Report (FIR) on receiving any information relating to commission of a cognizable offence under section 154 of the CrPC, 1973 or he has a discretion to conduct a preliminary inquiry further for the purpose of testing the reliability of such information before registering the same? This issue was earlier raised in *Lalita Kumari* v. *Government of Uttar Pradesh* [82]where in the Supreme Court in the light of conflicting views expressed in earlier decision by the same court referred the issue to a larger bench.[83] Three-judges bench in *Lalita Kumari case* [84]further requested the chief justice to refer the same matter to a Constitution bench as the issue was of greater public importance. The present case is the result of the reference where in the Constitutional bench was called upon to examine the repugnancy between section 154 of Cr PC and various state laws relating to police.

The Cr PC was enacted by the Parliament under entry 2 of the Concurrent list,[85] whereas Police Act, 1861 and other similar Acts in respective states were enacted under entry 2 of the State List.[86] The question whether the police officer shall register FIR Book or first record in General Diary possibly raises the issue of repugnancy as section 154 of CrPC,[87] mandates that it shall be recorded in the FIR Book where as several state laws allows such an entry in General Diary.

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81 2013 AIR SCW 6386.

82 2008 (27) Ginioel CC1.

83 In *State of Haryana* v. *Bhajan Lal* 1992 Supp. (1) SCC 335; *Ramesh Kumari* v. *State (NCT of Delhi)* (2006) 2 SCC 677 and *Parkash Singh Badal* v. *State of Punjab* (2007) 1 SCC 1 it was held that it is imperative to the police officer to register an FIR unders. 154 of the Cr. P.C. However a conflicting view was expressed in *P. Sirajuddin* v. *State of Madras* (1970) 1 SCC 595, Sevi v. *State of Tamil Nadu* 1981 Supp SCC 43; *Shashikant* v. *Central Bureau of Investigation* (2007) 1 SCC 630, and *Rajinder Singh Katoch* v. Chandigarh Administration, (2007) 10 SCC 69. In these cases the court held that the police offer is upon receiving the information may hold preliminary inquiry in appropriate cases to test the veracity of the information.

84 (2012) 4 SCC 1.

85 Entry 2. Criminal Procedure Code, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.

86 Police (including Railway and Village Police) subject to the provisions of entry 2A of list I.

87 154. Information in cognizable cases.— (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced

A plain reading of article 254(1) of the Constitution amply signifies that if there is any inconsistency between the provisions of Cr PC, and the Police Act, 1861, it is the Cr PC which would prevail over the other Acts. The court held that the provisions of the Police Act and other similar state legislations would be void to the extent of the repugnancy. Therefore, the issue whether the FIR is to be registered in the FIR book or in the General Diaryis settled in light of this judgment that section 154 of the Cr PC would prevail over the other state legislations.

Mahendra Bhatt v. *The State of Madhya Pradesh* [88] is a high court judgment in relation to repugnancy of law in arms licensing. The petitioners in this case are holders of gun licenses. When they applied for renewal, the licensing authority demanded renewal fees according to the rates mentioned in the notification issued by the State of Madhya Pradesh. The contention of the petitioner is that the subject of the arms is covered by entry-V of the Union List in the seventh schedule of the Constitution of India therefore state has no legislative competence to enact any law in this respect. For the same reason the state is not competent to issue any notification in this regard as under article 162 the executive powers of the state is coextensive with the powers of the legislature of the state. Central Government while exercising its power under entry-V of the Union List enacted Arms Act 1959 and section 44 authorizes the Central Government to make rules. The rules so framed by the Central Government deal with renewal of license and Rule 57 of the Arms Rules, provides for payment of fees in respect of grant and renewal of arms licenses which are specified in schedule IV.

The high court held that as renewal fees for arms licenses have already been fixed by the above provision, the state has no power to make any legislation and hence no executive power to charge renewal fees in respect of arms licenses. This is so specifically when the Central Government has prescribed fees for both, the initial grant and the renewal of license. Therefore, the state has no power whatsoever, either to legislate or to take executive action in respect of prescribing fee for either licence or the renewals.

Validity of section 8-B of the Karnataka Tax on Entry of Goods Act 1979 was challenged before the Karnataka High Court in *Shree Renuka Sugars Ltd.* v. *State of Karnataka*.[89]The said section provides that the purchasing dealer shall pay tax equivalent to the tax imposed on entry of sugar into local area to the manufacturer of the sugar. This obligation is imposed on the purchase dealer even the sugar that he purchased is not meant for entry to the local area. It was held that the wide language used in the section 8-B would violate the limits imposed under entry 52 of the list II of the seventh schedule. Therefore, to save the section, the

towriting as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

88 AIR 2013 M.P. 49.

89 AIR 2013 Kar. 87.

court used 'reading down' principle of interpretation and accordingly held that section 8-B of the Act is not applicable if the sugar was purchased in the State of Karnataka and the same was not intended to be consumed or to be sold in Karnataka State. A self-certificate from the dealer would suffice for exemption till appropriate rules regarding the certificate are made by the state.

XIV SERVICE MATTERS: ARTICLE 320

Civil servants play a vital role in implementing the public policy of the government and undertake the responsibility of reaching the government to the door steps of people. Civil servants are the arms and legs of the government. The civil service involves leading, monitoring, supervising hundreds of government actions that would affect millions of people. Therefore, keeping its importance in nation building, the Constitutional framers gave constitutional status to the civil servants and provided safeguards.

In *Government of Andhra Pradesh* v. *Gandhi*,[90]the basic question that was raised is whether punishment can be given based on the amended rules that came into force during the pendency of disciplinary proceedings?

The facts show that the amended rules do not speak expressly about the retrospective effect of the amendment to the services rules. The question is whether in the absence of any express provision regarding retrospectivity, merely where the amendment language says that the new rules are substituting old one, would give retrospective operation? On the point of legislative power of the state this Supreme Court already ruled that the state has legislative competence to amend or alter service conditions retrospectively under the proviso appended to article 309 of the Constitution of India.[91] However, such an amendment or rule should state it expressly.

The fact that the said rule has been substituted by an amendment could not be sufficient to make the amendment retrospective. Supreme Court relying on, held that[92] ordinarily retrospective operation is not to be given to a statute so as to prejudice an existing right or obligation, unless the amendment has expressly conferred or used in a language which is fairly capable of interpretation.

The object behind such a rule of interpretation is that, generally current law should govern current activities. This is the same premise on which a restriction was imposed on *ex post facto* law by Constitution of India under article 20 (1) and made it a fundamental right. The basis of such principle is explained in '*lex prospicit non respicit*' (law looks forward not back). Retrospective laws are antithetic to the principles of fairness. There is a genuine expectation from the people that

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90 AIR 2013 SC 2113.

91 See *Tejshree Ghag* v. *PrakashParashuram Patil* (2007) 6 SCC 220 and *Marripati Nagaraja* v. *Government of Andhra Pradesh* (2007) 11 SCC 522.

92 Maxwell *Interpretation of Statute*, (12th edn., 2004).

their behaviour could be regulated by current law and the transactions that are carried out under the current legal regime ought not to be judged by the future legal standards.

Therefore, it is clear that there is a presumption against the retrospective operation of a statute, and no greater retrospectivity could be conferred on a statute than the language makes it necessary. Merely using the word 'substituted' with the amending clause would not automatically convey the meaning that the rule which is substituted by the amending rules, are applicable retrospectively.

The other contention that the amended rules came into force before taking the decision by the disciplinary authority and therefore the amended rules would be applicable, also did not found favour with the apex court. Though there is no doubt that the service conditions could be altered, such alteration would be applicable prospectively unless the contrary is expressed. Looking into the spirit of restriction on *ex post facto* laws, it was opined that it is the date of proceedings, not the decision that would be counted for application of restrospectivity. But the court also pointed that the underlying object behind *ex post facto* law is that a person cannot be given a penalty greater than what he might have been given under the rule in force at the time of misconduct. Such a rule against the retrsopectivity is not only restricted to criminal laws but also to the service matters where penal consequences like termination and dismissal are awarded.

The unamended rules in this case, provide that once the charges have been proven, he could have been punished with compulsory retirement or removal from service or dismissal from service. The old rule 9(vii) deals with reduction or reversion but issuance of any other direction was not a part of it. Stoppage of increment had been introduced by way of amendment. The maximum punishment that could be imposed by the disciplinary authority is dismissal but the punishment imposed is reduction of the rank with stoppage of increment being a lesser punishment than the maximum. The court held that the disciplinary authority has not committed any error by imposing the said punishment under new rules.

An important issue that was raised in *Vijay Kumar Bansal* v. *State of Haryana*,[93] was regarding the importance of state public service commission. The appellant contention was that in State of Haryana, government systematically diluted the role of Haryana Public Service Commission by withdrawing several post from it's per view. In fact it was contended that 95% of the posts have been withdrawn over a period of time. Further, the state had passed School Teachers Selection Board Act, 2011 by which a board for recruitment of post of teachers was constituted. The Act was challenged as it violates the constitutional mandate under article 320. It had been contended that Constitution under article 320 mandated that the state to consult the public service commission to conduct examinations for the appointment of the posts under the state. Further the

93 2014 (2) SCT 284 (P&H).

commission is also expected to assist the state in framing the policies for services under the state. Therefore, the Act passed by the state had the effect of bypassing the Constitutional scheme.

It was held that an Act can be challenged only on two grounds *viz.,* lack of legislative competence and violation of any of the fundamental rights guaranteed in part III or of any other constitutional provision. As far as the first ground is concerned, it was observed that in the light of entry 41 of list II, schedule 7 of the Constitution, the state legislature was competent to enact the Act. With regards to the second ground of challenge that the Act is repugnant to article 320 of the Constitution of India, it is already interpreted that consultation by the state with the commission is only directory and not mandatory. Court held that though the examination of article 320 shows that the word "shall" is used in almost every paragraph it shall be understood as directory but not mandatory.

Explaining the reason for such an interpretation the court opined that in case it is compelled to read it as mandatory then every appointment made to the public services of the Union or a state, would adversely affect in the event of failure of observing any of the provision. That would invariably cause detriment to the public servant so appointed, that to without his fault. To support this interpretation the court relied upon *Crawford on Statutory Construction*,[94] wherein he observes that the question whether a statutory provision is mandatory or directory could be gauged by looking into the intent of the legislature rather than the language that is used. Intention of the statute could be ascertained not only from the language but also from its design and the consequences that would follow from the way it is constructed. Based on these considerations the court held that the provisions of article 320 of the Constitution of India are not mandatory but directory in nature. As a result, the Act was held not in violation of article 320 of the Constitution.

The rising expectations about good governance put enormous pressure on the civil servants and at the same time political influence over the civil servants have greater ramification. A well-functioning civil service is a condition precedent to good governance. Insulating the civil servants from the political influence is the key for such functioning. Recent instances of misuse of the oral orders by the ministers created a furor among the civil servants. As a result, several retired civil servants brought a writ petition before the Supreme Court under article 32 of the Constitution of India seeking directions to the government to implement recommendations of several committees. These recommendations need to be implemented for the purpose of preserving the integrity, fearlessness and independence of civil servants both at the Centre and state levels in the country. In *T.S.R. Subramanian* v. *Union of India*,[95]the following recommendations were presented before the court seeking its directions for the implementation.

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94 Earl Theodore Crawford, *The Construction of* Statutes (Thomson Law Book Company, 1940).

95 AIR 2014 SC 263.

i. Create an "independent" Civil Service Board or Commission both atthe Centre and the State.[96]

ii. Fix the tenure for civil servants to ensure stability.[97]

iii. All the instructions/directions/ orders/suggestions from administrative superiors, political authorities, legislators, and other persons must be in writing.[98]

The Constitutional status of civil servant has been enumerated in chapter XIV of the Constitution of India. It deals with conditions of service of persons serving the Union or the state. Article 309 expressly confers the power on both, Parliament and state legislatures to legislate for the purpose of regulating the recruitment and conditions. However, such legislations are subject to the provisions of the Constitution. Article 310 states that the all the civil servants hold their post during the pleasure of the President or the Governor of respective states. On the other hand, article 311 provides certain safeguards regarding dismissal, removal or reduction in rank of persons employed in civil services. Article 312 empowers to constitute All India Services and articles 318 to 333 deals with the Union Public Service Commission and state public service commissions. Article 320 mandates that these commissions are under the obligation to conduct examinations for the services of the Union and state.

Therefore, it is clear that the constitutional mandate is that the civil servants have to function in accordance with the Constitution and the laws made by the respective legislatures. Though the civil servants are backbone of the administration of the country and transparency in recruitment is the need of the hour, the court expressed its difficulty to direct the government to constitute an independent Civil Service Board (CSB) at the Centre and state Level, without executive control.

To insulate the civil servants from political/executive interference there is a need for independent body. But the court pointed that article 309 of the Constitution enables the Parliament to enact a Civil Service Act for setting up a CSB to guide the executive in matters of appointment, transfer, removal and disciplinary actions. Therefore, the Supreme Court directed the Union, all the states and Union territories to constitute CSB consisting of high ranking officers within 3 months period till Parliament brings legislation.

As far as the tenure is concerned, the Supreme Court recognized that the civil servants are not having any stability of tenure and they are transferred frequently

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96 It is based on recommendations by the *Hota Committee*, 2004, 2nd Administrative Reforms Commission 2008 (10th Report) and the statement adopted at the Conference of Chief Ministers on Effective and Responsive Administration, 1997.

97 This recommendation is based on *Jha Commission* 1986, Central Staffing Scheme, 2nd Administrative Reforms Commission (10th Report) and Hota Committee Report, 2004 (Main Recommendations).

98 Based on *Santhanam Committee* Report, 1962.

by the executives. In fact the Union and about 13 states accepted the necessity of minimum tenure. Recognizing the fact that frequent shuffling/transfer of the officers is harmful to good governance and minimum tenure would enable efficient service, the court directed the Union, state governments and Union territories to issue appropriate directions to secure minimum tenure of service to civil servants, within a period of three months.

Regarding the third point on recording the instructions and directions in writing, the court says that there is a deterioration of standards of integrity and accountability of the public servants and this scenario could be attributed to political influence. It is also pointed that Rule 3(3) (iii) of the All India Service Rules specifically mandates such orders and directions in writing.[99] After referring to *Hota* Committee, 2004 and *Santhanam* Committee Reports, the court held that the civil servants cannot function on the basis of verbal or oral instructions as it would be easy to exert pressure by the superiors and executive. Further the enactment of Right to Information Act, 2005 mandates the information to be given to all citizens and such mandate would be defeated if oral or verbal instruction are allowed. Recording of instructions and directions are also necessary for fixing responsibility and to ensure accountability. In view of these observations, the court again directed all the state governments and Union territories to issue directions like Rule 3(3) of the All India Services (Conduct) Rules, 1968, within three months.

The relationship between policy-makers (politicians) and executors of those policies (civil servants) is of utmost importance for the functioning of the civil service, its professional standards, impartiality, accountability and credibility.[100] Though policy making and policy implementation are two distinct branches, no one can deny the mutual influence. The nature of relation between political executive and civil servant has greater impact on nation building. The very nature of the interaction between

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99 R. 3(3) of the All India Service Rules:

(i) No member of the Service shall, in the performance of his official duties, or in the exercise of powers conferred on him, act otherwise than in his own best judgment to be true and correct except when he is acting under the direction of his official superior.

(ii) The direction of the official superior shall ordinarily be in writing. Where the issue of oral direction becomes unavoidable, the official superior shall confirm it in writing immediately thereafter.

(iii) A member of the Service who has received oral direction from his official superior shall seek confirmation of the same in writing, as early as possible and in such case, it shall be the duty of the official superior to confirm the direction in writing.

100 See: ZeljkoSevi and Aleksandra Rabrenovic, Depolitization of the Public Administration: Towards the Civil Service, *available at*:http://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0 QFjAA&url=http%3A%2F%2Fwww.nispa.sk%2Fnews%2Fsevic.rtf&ei=MVioU7nOGNOhugTm44KoBA&usg=AFQjCNGf9F4hrLU1qMMmkqJmxy65P-ndXw&bvm=bv.69411363,d.c2E (last visited on 20th June 2014).

these two important authorities would dictate the efficiency of constitutional governance. The principle of democracy suggests that the elected politicians are better than civil servants in serving the public interests as they are responsible to the public. Though there is a clear cut distinction between the policy-formulation and policy-implementation, the distinction is slowly diminishing due to political influence on civil servants. In one sense the policy formulation being legitimate domain of the political class it is quiet but natural that the civil servants are expected to be subordinate to them. But in a developing or transitional country like India, the role of civil servants has become very complex and arduous. Coalition between politicians who should supervise the civil servants and the civil servants is significantly increasing and creating innumerable challenges. As a result *T.S.R. Subramanian* case has a far reaching importance in this coalition. One gets the feeling that the apex court is well aware about the factor that complete autonomy to the civil servants would be disastrous but at the same time they need to be to some extent insulated from the political pressures. That could be the reason for agreeing in principle to establish CSB but intricacies of creation of such board is largely left in the hands of the legislature.

XV ELECTIONS: ARTICLE 324

In *Chief Election Commissioner* v. *Jan Chaukidar (Peoples Watch)*,[101] the fundamental issue that was raised was whether a person who is confined in prison, or in the lawful custody of the police is not entitled to vote, is he/she qualified to contest elections to the House of People or the legislative assembly of a state?

Article 326 of the Constitution provides for elections to the House of the People and to the legislative assembly of every state on the basis of adult suffrage. In accordance with article 326 of the Constitution, Parliament has enacted the Representation of the People Act, 1950 and 1951. As per the Act of 1950, every person who has been registered as a voter in electoral rolls of a constituency would be an elector. However, section 62, sub- section (5) of the 1951 Act expressly provides that no person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police.

The controversy arose in the light of qualifications provided by section 4 and 5 of 1951 Act which mandates that a person contesting in the election must be an elector for any Parliamentary constituency in case of election to Lok Sabha and elector for any assembly constituency in the concerned state for the election to that state legislative assembly.

If a person is not entitled to vote by virtue of section 62 (5) of the 1951 Act, he/she would not be a elector within the meaning of section 4 and 5 of the Act 1951 and hence disqualified to contest in any election to Lok Sabha or state legislative assembly. The High Court of Patna held that right to vote is a statutory right therefore, it could be taken away by law. The idea of not allowing a person

101 (2013) 7 SCC 507.

convicted or in the custody of police is to keep the crime away from the elections. Therefore, reading constitutional and the statutory provisions together, it is clear that once a person cannot cast his vote he/she is not an elector and cannot contest. Supreme Court agreeing with the high court decision held that right to vote being a privilege given by the statute, could very well take it away hence there is no reason to interfere with the decision of the high court. *People's Union for Civil Liberties* v. *Union of India*[102] is one of the landmark judgments pronounced by the Supreme Court this year that has tried to bring about a complete confidentiality and secrecy in the implementation of election rules in India. There is a secret ballot system in India that includes a right to cast a vote through traditional ballot papers or through Electronic Voting Machines (EVMs) that were introduced in 1998 for any deserving candidate and the exercise of such right by people remains confidential. In addition, the prevailing electoral system not only allowed a citizen to exercise right to vote under section 79(d)[103] of the Representation of People Act, 1951, (RPA), but also gave him the liberty of not to vote under Rules 41(2)[104] and (3)[105] and 49-O[106] of the Conduct of Election Rules, 1961 by signing or giving a thumb impression on form 17 A filled in by the presiding officer of respective polling booth.

In this case, the challenge before the Supreme Court was that, procedure followed by the electoral officers as per Rules 41(2) & (3) and 49-O of the Conduct of Election Rules, 1961 violated right to privacy/secrecy guaranteed under the Constitution of India as well as section 128[107] of the Representation of People Act, 1951 and Rules 39[108] and 49 M[109] of the Conduct of Election Rules, 1961 as the casting of a negative vote was not a secret affair. A three judge bench of the Supreme Court held that election is the reflection of the will of the people. Universal Adult Suffrage ensures that people of India above 18 years of age and who are not otherwise disqualified under the Constitution of India or any law in force in India participate in the electoral process without any hesitation and hindrance. Maximum voters' participation determines the strength of Democracy in India. Hence, maintenance of secrecy becomes fundamental element of free and fair elections to

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102 2013 AIR SCW 5597.

103 S.79(d):Electoral right means the right of a person to stand or not to stand as, or to withdraw or not to withdraw from being, a candidate, or to vote or refrain from voting at an election

104 R. 41(2): If an elector after obtaining a ballot paper decides not to use it, he shall return it to the presiding officer, and the ballot paper so returned and the counterfoil of such ballot paper shall be marked as "Returned: cancelled" by the presiding officer.

105 R. 41(3):All ballot papers cancelled under sub-rule (1) or sub-rule (2) shall be kept in a separate packet.

106 R. 49(O): Elector deciding not to vote

107 S. 128: Maintenance of secrecy of voting

108 R. 39: Maintenance of secrecy of voting by electors within polling station and voting procedure

109 R. 49 M: Maintenance of secrecy of voting by electors within polling station and voting procedures

ensure that more voters cast their vote without any fear. In the ballot paper system one could secretly cast a secret vote but it was not possible in the EVMs. To resolve the issue at hand, the Supreme Court directed the Election Commission of India to introduce a new tab called 'None of the above' (NOTA) in the EVMs to facilitate the voters to cast a negative vote in the electoral process and held that Rules 41(2) & (3) and 49-O of the Conduct of Election Rules, 1961 violates fundamental rights guaranteed under the Constitution of India and Rules 41(2) & (3) and 49-O of the Conduct of Election Rules, 1961.

Another significant reform in the electoral process was introduced by the Supreme Court in *Dr. Subramanian Swamy* v. *Election Commission of India*,[110]wherein the appellant through a SLP prayed for the implementation of a system of 'paper trail/paper receipt' in the 'EVM'. As per the prevailing system, the voter is unable to confirm whether his vote was recorded against a specific candidate. This paper trail/paper receipt can be considered as an evidence of the fact that the voter has rightly casted his vote to a particular candidate. The appellant contended that though the Election Commission of India (ECI) guarantees for no instance of tampering with the EVMs till date, no one can deny completely about the possibility of hacking of electronic devices. The paper trail/paper receipts to be maintained in safe boxes and to be utilized only in case of any election dispute.

The ECI informed the court that there are attempts made for incorporating a viable Voter Verifiable Paper Audit Trail (VVPAT) system to bring about more transparency into the election process. Under extensive training and supervision and under different geographical conditions, the ECI carried out trials of VVPAT successfully in a simulated election in different constituencies. The technical expert committee also gave an approval for the design of the VVPAT. On examining all the reports and documents submitted by the ECI, the Supreme Court held that paper trail/paper receipt/VVPAT system is the demand of the present day system and is of utmost importance to bring about confidence in the voters and also transparency in the electoral process. Considering the fact that ECI monitors around one million polling booths, the Supreme Court directed ECI to carry out the implementation in gradual stages or in phased manner.

In *Bhagyoday Janparishad* v. *State of Gujarat*,[111]two public interest litigations were filed in the High Court of Gujarat challenging the provisions of chapters 4 and 5 of the instructions on Election Expenditure Monitoring (2012) issued by the ECI under article 324 of the Constitution of India. As per the instructions issued by the Election Commission various teams were created and empowered to intercept and search randomly any vehicle or person at any time. Further, on search, if the team found any cash of Rs.2.5 lakhs or more; or any other articles such as, gold, diamonds, *etc*. in the possession of such a person, then the team members have

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110 (2013) 10 SCC 500.
111 AIR 2013 Guj. 14.

power to interrogate. If the cash or article so found is without proper documentation or proper explanation the person can be suspected of using the same for bribing the voters and necessary action could be taken. However, if no criminality is suspected, the team is empowered to intimate assistant director of income tax in charge of the district about the recovery of such cash and the assistant director would reach at the spot for taking appropriate action according to the provisions of the income tax laws. More importantly the entire procedure of checking and seizure would be video graphed.

The contention of the petitioners was that these instructions created great hardship and difficulties, resulting in harassment and embarrassment to the public, particularly the small businessmen and farmers who carry cash for their daily chores.

The question that was raised by these petitions was whether the guidelines issued by the ECI, are applicable and binding upon the general citizens who are not at all involved in the election process except their right to vote and thereby violates the fundamental rights of the citizens.

The high court held that, election commission cannot exercise its powers beyond the law and exercising its powers is subject to constitutional limitations and fairness. Howsoever wide the powers of the election commission and howsoever the purpose may be laudable, exercising the powers and the direction so issued under such powers cannot derogate the existing law. The court opined that Parliament enacted the Representation of People Act, 1951 under the authorization of articles 324,327 and 328 of the Constitution. As a result, the power of election commission to issue such direction is not only controlled by article 324 but also the Representation of the People Act, 1951.The object of issuing such instruction is to ensure free and fair elections and to avoid influence of money or liquor. Though section 77 of the Representation of the People Act, 1951 is complied with in its letter and spirit, section 77 applies only to the candidate contesting at an election. Therefore, a common citizen who is no way involved with the election can neither be harassed nor is his right of privacy or free movement be curtailed under the Instructions on Election Expenditure Monitoring (2012) issued by the ECI.

As far as involving the income tax authorities is concerned, the high court held that it amounts to direct intrusion on the powers of the income tax authorities under the Income Tax Act, 1961. It opined that the Parliament has consciously not empowered election commission with such power. Therefore, it was held that the instructions issued by the election commission empowering its officers to random search any vehicle on the road and other powers of seizure and informing the income tax official's *ultra vires* being violative of article 21 of the Constitution and also beyond the powers conferred on the election commission. However election commission can search or seizure any vehicle, money or goods when it receives any reliable or credible information and the same be reduced into writing.

XVI NEW AMENDMENTS

The Preamble and article 1 of the Constitution firmly enshrines the unity and integrity of India. To secure the same, the Constitution though intended to be federal, ultimately leaned towards strong centre. To the same effect, the Constitution also envisages free trade, commerce and intercourse throughout the territory of India. However, at the same time it makes reference to various arrangements for special status to states and regions aiming at reducing regional imbalances. Article 371 is one of such attempt wherein the Constitution appears to have identified dual method of development and inclusive growth to reduce regional imbalances. The first of its method could be traced under article 372 (2) by which special development funds were provided through development boards in Vidarbha region. These special development funds focus on investing in infrastructure projects and human resources up gradation. The second model includes provisions for regional based employment opportunities in the government sector and reservations in the higher educational institutions in Telengana region.[112]

The purpose of such special treatment is to provide institutional mechanism for equitable allocation of funds to meet the development needs of a backward region, enhance human resources and promoting employment from the region by reserving certain percentage of post in public employment and seats in educational and vocational training institutions.[113]

To provide such special treatment, a constitutional amendment is required as some of such actions could be violation of fundamental rights particularly article 15 and16. In the year 1998, the Government of Karnataka sent a proposal to the Union government requesting to amend article 371 for the purpose of providing regional reservations in public employment and education on lines of 371 D for Hyderabad-Karnataka region. Union government rejected the proposal in 2002 on the ground that the circumstances in Andhra Pradesh could not be equated with Karnataka. Again in the year 2008 based on a high power committee report the State of Karnataka made another similar request to the Union along with the detailed report of human development indicators. This time even both houses of the Karnataka State Legislature passed a resolution to this effect and the same was sent to the Union government. Finally after several deliberations the Constitution (118th Amendment) Bill 2012 was introduced in the Parliament and same was passed by both the houses. The Constitution (Ninety-Eighth Amendment) Act, 2012 received the consent of President of India on 1st January 2013 and inserted a new article 371 J. This amendment establishes a separate Development Board for the Hyderabad-Karnataka region of the State of Karnataka consisting of the districts of Gulbarga, Bidar, Raichur, Koppal, Yadgir and Bellary. Unlike article 371 (2)

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112 Art. 371 D.

113 See: 164th Report on Constitution (One Hundred Eighteenth Amendment) Bill, 2012, Department-Related Parliamentary Standing Committee on Home Affairs, Parliament of India, Rajya Sabha.

and 371 D, 371 J provides dual benefit to Hyderabad-Karnataka Region. It aims at accelerated development, promotes inclusive growth and provide for reservations for domiciles of the region in education and vocational training institutions.

Inter-state and intra-state disparities have resulted in broader social, political, economic implications and impacted various policy decisions of the governments. Uneven economic growth during post-independence resulted in regional disparities and such disparities continued to persist. Failure to use both natural and human resources resulted in regional imbalances. Initial advantages of certain regions ensured further widening the disparities.[114] Even-growth and equitable distribution of national wealth being a condition precedent for the unity and integrity of the nation, uneven disparities directly threatens the national wellbeing. Lack of balanced economic growth and growing disparity in terms of income, poverty and socio-economic development no doubt requires a serious attention and immediate action. But one should not forget the fact that the backwardness needs to be addressed properly. Mere infusion of funds or providing regional reservation on the basis of descent is not the answers for balancing the imbalances. The experience in Andhra Pradesh with regard to special status attributed by article 371 D shows increase in the social and economic tensions between the regions rather than reducing the disparities between the regions.

Providing special status may be justified in a sense but such a move might give rise to development of political leadership and the policy measures in sub-nationalism.[115] The presence of powerful sub-nationalism movements not only pose a threat to the unity and integrity of the nation but also create hatred among the people of different region. Therefore, there is a need for balanced action to command the obedience and allegiance of all the citizens to the Constitution which could be attained by judicious use of such special status.

XVII CONCLUSION

Constitution uses the phrases sparingly and often a single phrase may connote a wider meaning. Such a usage makes the Constitution a living document. Because it is a living document, the expressions of the Constitution are required to be interpreted and such an interpretation must be dynamic, contemporaneous and keeping pace with changing times. This imposes a heavy burden on the judiciary to keep the governance in accordance with the Constitution. Though the state is under the constitution but what is constitution could be answered by the courts. Thus Constitution is what judges say. This is not to say that the judiciary is above the Constitution. Like other two organs, judiciary is also regulated by the Constitution. However, it being the final interpreter of the Constitution it needs to

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114 Dr. D.M.Ratnakar, "Article 371 (J) – a Boon to Hyderabad Karnataka's Development", 3 *Indian Journal of Applied Research* 468 (Nov.2013).

115 Sub-nationalism refers to asserting the interest of one's own region, as separate from the interest of the nation and other regions.

balance the concept of living Constitution with destabilizing constitutional interpretation by self-imposed regulation. Such self-discipline is evident in the judiciary if one looks at the interpretations given by the Supreme Court, particularly defining the scope of article 226. On the other hand, *Bhullar* and *Mahindra Nath* show the constitutional miss-governance and selective approach of Supreme Court. Several cases regarding election, qualification of members particularly *Lily Thomas,Jan Chaukidar* and *People's Union for Civil Liberties* paved the way for much needed election reforms. The Gujarat High Court's judgment in *Bhagyoday Janparishad* shows judicial commitment to protect the fundamental rights of the citizen. In cases, that involved corruption on a large scale by public authorities, Supreme Court once again reiterated that judicial daring is not daunted when glaring injustice demands. The role of the apex court is laudable in standing against the odds and monitoring the progress of these cases. Finally, the new 98th Amendment to the Constitution regarding special status to Hyderabad-Karnataka region is justifiable on grounds of regional imbalance. It would be interesting to see how this kind of special treatment would be handled by the Union in future in the wake of several such demands pending before it.