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CONSTITUTIONAL LAW-II

(PROVISIONS OTHER THAN FUNDAMENTAL RIGHTS)

*M. R. K. Prasad**

I INTRODUCTION

CONSTITUTIONAL CULTURE requires a democratic spirit not only in the organs of the government but also in the nation's polity. It underlies a respect to the letter and spirit of constitutional provisions. Constitution, being a working instrument drafted by the collective will of the people, is expected to subserve the generations to come. The idea of a living Constitution is that it could be meaningfully relevant at any given point of time by adapting and evolving to meet the needs of the changing times and at the same time be able to sustain and stand against human manipulations. The basic purpose of the Constitution is to have a limited government; and to keep the government within the constitutionally drawn limits. The judiciary is under the dual duty of making the Constitution living yet stable; and safeguards it from the manipulations of those who are entrusted with the power by the Constitution. In other words, the constitutional transformation by way of judicial interpretation is concerned with how to limit and constrain the use of public power so as to restrict the dilapidation of sovereignty of people.

Constitutionalisation of public life puts an enormous responsibility on the constitutional courts when state's failures are mounting. This, in particular creates a heavy burden on the Supreme Court, due to the liberal constitutional procedure virtually guaranteeing every case to reach the Supreme Court. In this context, it is fascinating to see how reinterpretations of the same old text of the Constitution is used by the judiciary during the year 2015 to meet the varying needs, changing circumstances and conflicting social values.

II PARDONING POWER: ARTICLE 72 AND 161

* Fulbright Scholar, Principal, V.M.Salgaocar College of Law, and Dean Faculty of Goa University, Goa. The author acknowledges Bhakti Naik, and Amod Shirali Assistant Professors of Law, V.M.Salgaocar College of Law for their research assistance and Sandhya Ram, Assistant Professor for her valuable inputs.

1 AIR 2015 SCW 6605; (2015) 43 SCD 153.

In *Union of India* v. *Sriharan @ Murugan*,[1] an important question was raised whether the "Appropriate Government" is permitted to exercise the power of remission under section 432/433 of the Criminal Procedure Code, 1973 (Cr PC) after the parallel power has been exercised by the President under article 72, or by the governor under article 161 or by the Supreme Court in its constitutional power under article 32. This issue was raised by way of a reference from the constitutional bench of the Supreme Court from *Union of India* v. *Sriharan @ Murugan*.[2] The brief circumstances that lead to this petition is in *V. Sriharan@ Murugan* v. *Union of India*,[3] wherein the death sentence was commuted to imprisonment for life on ground of delay in execution. The court while delivering the judgment held that life imprisonment means imprisonment till the end of one's life, subject to any remission granted by the appropriate government.

Immediately after this judgment several political developments in the State of Tamil Nadu led to filing of a criminal miscellaneous petition by union of India when the Government of Tamil Nadu proposed to grant remission to seven convicts whose death sentence was commuted to life imprisonment. This governmental decision was challenged before the Supreme Court. After considering several judgments, the court held that to decide the contention, it is necessary to answer the main issue whether the government can exercise a parallel power of remission after remission has already been granted by the President, Governor or by the court. As the issue required extensive interpretation of Constitution and the Cr PC, the matter was referred to the constitutional bench.[4]

In the reference, union of India raised a contention that once the power of commutation/remission has been exercised ina particular case by a constitutional forum particularly the Supreme Court, there cannot be a further exercise of the executive power for the purpose of commuting/remitting the sentence of the same convict in the same case by invoking sections 432 and 433 of Cr PC. The controversy is that Supreme Court commuted the death sentence into life imprisonment under article 21 by exercising judicial power. If one has to accept the contention of the union of India, the effect would be that once the court commutes the sentence for violation of article 21 it would automatically foreclose the right of the convict to seek further commutation or remission of sentence which is otherwise a statutory right. And such an expansive interpretation would severely affect the rights of the convict even if he/she is in a vegetative state due to old age or terminal illness.

The court held that the power of remission always vests with the state executive and that the court can only give directions to the state in the exercise of such power,

2 (2014) 11 SCC 1.

3 AIR 2014 SC 3668.

4 *Supra* note 2 at 18.

5 See *State of Punjab* v. *Kesar Singh* (1996) 5 SCC 495; *Delhi Administration* (now NCT of Delhi) v. *Manohar Lal* (2002) 7 SCC 222; *State Government of NCT of Delhi* v. *Prem Raj* (2003) 7 SCC 121.

but it cannot grant any remission andprovide for premature release on its own. Whether to commute the sentence or not has to be decided by the appropriate government.[5]

With regard to the relation of articles 72 and 161 with sections 432 and 433 of the Cr PC it was held that the power of the appropriate government to grant remission after the parallel power is exercised under articles 72 and 161 of the Constitution by the President and the Governor of the state respectively, is distinct and separate from that of the constitutional heads. These are two distinct remedies available to the convicts. It is a well settled principle that section 432/433 Cr PC and article 72 and 161 though similar, but are distinct and different. "Though they flow along the same bed and in same direction, the source and substance is different."[6] As a result the appropriate government can consider and grant remission under sections 432 and 433 of the Cr PC even if such request to commutation or remission was earlier made and exercised under article 72 by the President and under article 161 by the Governor. When it comes to power of the Supreme Court under article 32 of the Constitution it was held that the power under sections 432and 433 is to be exercised by the appropriate government under the statute and that it is not for the court to exercise the said power and it is always left to be decided by the appropriate government.

The judgment in *Sriharan* emphasises that the commutation of death sentence to life imprisonment due to delay in disposal of the mercy petition under article 32 is based on human rights jurisprudence and as a result it is different from remission or commutation under section 432 and 433 of Cr PC. Declaring sections 432 and 433 as independent statutory provisions from article 72 and 161 seems to be logical as change of circumstances may require a different approach altogether while deciding remission and commutation. In exercise of the power under sections 432 and 433, the government may be looking at different parameters like whether the convict had lost his potentiality incommitting the crime and whether there was any fruitful purpose in confiningthe convict any longer or whether the convict is terminally ill *etc*. If the state arbitrarily exercises its power under sections 432 and 433, it could be corrected by way of judicial review.

In *Yakub Abdul Razak Memon* v. *State of Maharashtra*,[7] once again the issue of judicial review over President's power to grant pardon under article 72 arose before the Supreme Court. The petitioner was sentenced to death in the year 2007 for involving in Bombay Blast case. The basic contention of the petitioner was that he was not given necessary time to appeal against the order of the President rejecting his mercy petition as per the judgement of the Supreme Court in *Shatrughan Chauhan* v. *Union of India*.[8] In the said case the court held that when a mercy petition is rejected, there has to be a minimum period of 14 days between the date of communication of rejection to the petitioner and his family members and the scheduled date of execution.

6 *Maru Ram* v. *Union of India* 1981 (1) SCR 1196.
7 2015 AIR SCW 4613.
8 (2014) 3 SCC 1.
9 *Id* at 89.

The court while explaining the rationale behind 14 days time held that such a period is necessary to: [9]

i. Allow the prisoner to prepare himself mentally for execution, to make his peace with God and prepare his will and settle other earthly affairs.
ii. Allow the prisoner to meet his family members. It also allows the family members to make necessary arrangements to meet the prisoner for the last time.

The petitioner's contention was that both these conditions need to be satisfied before he was executed and that the present order did not give him such time and hence invalid. However the facts of the case show that his conviction was confirmed by the Supreme Court on March 21, 2013. Thereafter a review petition was filed in the Supreme Court which was dismissed. After the rejection of the application for review, the petitioner's brother made an application for mercy under article 72 of the Constitution to the President of India. Since the petitioner had not filed a curative petition, he was entitled to seek reopening of the review petition. Accordingly, his review petition was heard by a three-judge bench in the open court and the same was rejected on April 9, 2015. He filed a curative petition on May 22, 2015.

Meanwhile rejection of mercy petition by the President was communicated to the petitioner on May 26, 2014. The petitioner did not challenge the rejection of the mercy petition by the President of India. The curative writ petition was dismissed on July 21, 2015. After rejection of the curative petition on the July 21, 2015, the petitioner submitted a mercy petition to the Governor of Maharashtra and another one to the President of India. Both these mercy petitions have been rejected. The death warrant was issued on April 30, 2015 which was admittedly received by the petitioner on July 13, 2015 and the date of its execution is July 30, 2015.

At this juncture the present petition was filed when the news of rejection of mercy petition by the President was declared on July 29, 2015 contending that from the date of rejection of mercy petition *i.e.*, July 29, 2015 the petitioner is entitled 14 days time hence the execution of death must be stayed.

It was held that the mercy petition is considered by the President of India in exercise of his power under article 72 of the Constitution of India. Once the said petition was rejected by the President after due consideration of all the relevant facts and the petitioner did not challenge the same, the rule of 14 days would not apply. In the present case the contention of the petitioner is not relating to the first mercy petition but for the second. It was rightly pointed by the Supreme Court that if such kind of repetitive mercy petitions are allowed to be submitted and further allowed to challenge the rejection of such petitions in the court of law, would not only prolong the proceedings but also amount to travesty of justice.

The court opined that the present petition is a clear exposure of the manipulation of the principle of rule of law and held that there was sufficient time available to the petitioner to make arrangement for his family members to meet him inprison and make necessary worldly arrangements. There was adequate time to prepare him to meet his maker and to make peace with himself. Therefore, the petition for staying the execution of the death warrant was dismissed.

This case differentiates the application of 14 days rule prescribed by *Shatrughan*

Chauhan case. The ruling in *Shatrughan Chauhan* would apply only when the mercy petition was first rejected by the President or Governor.

III APPOINTMENT OF JUDGES

Judicial hegemony in constitutional interpretation is an outcome of judicial review. Independency of judiciary is critical to maintain such hegemony. However, judicial independence and judicial appointments in India had a long standing relationship. Article 141 which expressly makes the interpretation by the Supreme Court final and binding contributes immensely to the judicial domination. The belief that rule of law could be achieved only by separation of powers reinforces the idea of independent judiciary. Even constitutional debates show the restraint by the members in conferring unfettered discretion to the legislature and executive in appointment of judges. Yet the appointment of judges becomes centrifugal force in the debate on judicial independence in India. In fact judicial control over appointment of judges become *sina qua non* with judicial independence. Judicial overtake of appointment of judges of constitutional courts in the *Second Judges* case[10] and legislative attempt by Constitution (Ninety-Ninth Amendment) Act, 2014 and the National Judicial Appointment Commission Act, 2014 (NJAC) resulted in intensive engagement between the judiciary and the Legislature. Issue of judicial appointments under articles 124 and 217 emerges principally from Supreme Court's interpretation in three constitution bench judgments. The issue once again came for the consideration before the Supreme Court in *Supreme Court Advocates-on-Record - Association* v. *Union of India.*[11]

In this case a group of petitions were filed before the Supreme Court of India challenging the validity of the Constitution (Ninety-Ninth Amendment) Act, 2014 and NJAC Act, 2014. A three judge bench was originally constituted to decide the matter. The bench comprised of Anil R. Dave, Chelameswar and Madan B. Lokur JJ. The petitioners requested the court that these petitions should be referred to a bench of five judges as per the provisions of article 145(3) of the Constitution of India for the reason that substantial questions of law with regard to interpretation of the Constitution of India are involved. Agreeing with the contention of the petitioners, the court referred the matter to chief justice for constitution of a larger bench.

Accordingly the chief justice constituted a five-judge bench, comprising of Anil R. Dave, Chelameswar, Madan B. Lokur, Kurian Joseph and Adarsh Kumar Goel JJ. Meanwhile the Ninety-ninth Amendment to the Constitution and the NJAC Act were notified and were brought into force. As a result Anil R. Dave J became an *ex officio* Member of the NJAC, as he is the second senior most judge after the Chief Justice of India. Hence, the chief justice reconstituted the bench replacing Anil R. Dave J with Jagdish Singh Khehar J.

At this juncture Fali S. Nariman J made a prayer for recusal of Jagdish Singh Khehar J from the bench, which was seconded by Mathews J. Nedumpara J. The

10 (1993) 4 SCC 441.

11 2015 AIR SCW 5457; (2015) 43 SCD 070.

reason for asking recusal was that Jagdish Singh Khehar J was then a member of the collegium under the NJAC Act and would be inappropriate if not unfair for him to decide the case. The issue that arose was whether it was appropriate for a judge to sit on a bench and adjudicate the constitutionality of NJAC, when the judge himself was a member of the collegium constituted under the impugned statute. Further, if he continued as a judge and adjudicated the case, whether there could be a possibility that the decision may result in review or filing of a curative petition. Ruling in negative the bench decided that no conflict of interest could be made and no other justifiable reason in law, for Jagdish Singh Khehar J to be recused from the hearing of the matter.

In spite of such unanimous order passed by the bench, Jagdish Singh Khehar J passed an order on recusal while expressing his initial reluctance to continue in the bench when doubts were raised about the conflict of interest. He justified his decision to continue with the hearing of the case on grounds that if he recused himself it would set a wrong precedent and in the absence of any justifiable objection it would give a wrong impression that the judge was scared. He further emphasized that a judge takes an oath of discharging the duties without fearor favour. Hence his recusal in absence of any justifiable ground and mere objection raised by the petitioner would amount to breach of his oath of office.

This issue raises a serious doubt about the application of the principle of natural justice, *nemo judex in suacausa*– no one can be judge in his owncause. Application of this principle to the judiciary is contentious particularly in cases where the powers of judiciary are involved. One of the petitioners, Mathews J. Nedumpara raised a fundamental question whether the Supreme Court in deciding a case involving the power of appointment of judges of the Supreme Court would evince public credibility. As referendum is a farfetched option in India, there is no one to decide such an issue. Hence the doctrine of necessity leaves no other option than the Supreme Court itself deciding the question.

The fundamental issue that were raised in this case was whether conferring the power of appointment and transfer of judges of high court and Supreme Court to other agency than the judiciary itself would render the judiciary subservient to such authority, and thereby, impinge on the independence of the judiciary hence violates basic structure.

The primary contention of the Union of India was that the constitutional amendment regarding the appointment and transfer had been passed unanimously by both the Lok Sabha and the Rajya Sabha with absolute majority. As a result the Constitution (99th Amendment) Act manifested, the unanimous will of the people, and the same must be deemed to be expressive of the desire of the nation. Hence it would be inappropriate to test it through a process of judicial review.

However, the court held that such an expansive interpretation, if accepted would result in negating the very concept of judicial review. If such interpretation is accepted, all constitutional amendments would be automatically excluded from the scrutiny of judicial review as all constitutional amendments require support of majority of members of Parliament and in that sense reflect thewill of the people, for the simple reason, that parliamentarians are considered as representatives of the people.

It was held that once the constitutional amendment is supported by the required number of members of the Parliament it would be treated that the constitutional amendment was validly passed. Once such a procedure is satisfied it is immaterial whether such an amendment is passed by bare minimum majority postulated or by a substantial majority, or approved unanimously. Once the amendment was brought into force and if such amendment breaches the basic structure of the Constitution, it would be subjected to judicial review on the touchstone of the "basic structure" of the Constitution, and the parameters laid down by Supreme Court in *Kesavananda Bharti* case.[12] Therefore, the Ninety-Ninth Constitutional Amendment Act, 2014 and the NJAC Act, 2015 would be subject to judicial review on ground of destroying the basic structure of the Constitution.

The next contention of the attorney general was that the interpretation of Supreme Court in *Second Judges* case,[13] is erroneous. He placed his reliance on the following articles wherein the Constitution expressly provided for judicial control over the legislature and the executive actions. He relied on articles 124, 125, 126, 127,128, 130, 133, 134, 137, 138, 139, 32(2), 140, 142(2), 145, 146 and contended that Constitution never intended to give supremacy to the judiciary, hence the judicial pronouncements holding "consultation" with the chief justice in matters of judicial appointments and transfer as equivalent to concurrence need a review. After an elaborate discussion on the claims and counter claims made by the petitioners and the respondent, the court held the following:[14]

> It was observed that the term "consultation" used in articles 124, 217 and 222 has been considered at length by the Supreme Court previously and settled the issue by holding that the term"consultation" means concurrence and thereby conferred supremacy to the collegium in selection and appointment and transfer of judges to the higher judiciary.

Supreme Court explained the following parameters for arriving at the above conclusion:

i. In the view of preserving independence of the judiciary, the provision of mandatory consultation with the Chief justice of India shall be read as primacy in the matter of appointment of judges must rest with the judiciary. This proposition took shape in *second judges case* and crystallised by the *third judge's case* in 1998.
ii. Ambedkar during the Constituent Assembly debates insisted that the judiciary must be independent ofthe executive. While debating on the subject of "appointment" of Judges to the higherjudiciary, B.R. Ambedkar noted the view ofthe Constituent Assembly that the Members were generally in agreement, that "independence of the judiciary", from the executive should be made as

12 (1973) 4 SCC 225.
13 *Supra* note 10.
14 *Ibid*.

clear and definite as it could be made by law. So one can see the Constituent Assembly realized that "appointment" of the Judges to thehigher judiciary, had a direct nexus with "independence of the judiciary".

iii. The actual practice and manner of appointment of Judges to the higher judiciary after commencement of the Constitution also amply display that absolutely all judges (except in one case) appointed since1950, had been appointed on the advice of the Chief Justice of India. This fact clearly establishes that the executive by practice accept to the judicial supremacy in appointment of judges to the higher judiciary.

iv. Appointment of judges only on the advice of the Chief Justice of India is also well recognized by the Memorandum of Procedure for appointment of Judges and Chief Justices to the higher judiciary drawn in 1950, and the Memorandum of Procedure forappointment of judges and chief justices to the higher judiciaryredrawn in 1999, after the decision in the Second Judges case.

v. In the light of article 50, if the power of appointment of Judges was left to the executive, the same would breach the principles of"independence of the judiciary" and "separation of powers".

In view of the above observations in the matter of appointment and transfer of judges to the higher judiciary, Chief Justice of India's advice would be binding on the President. However, it is not merely the chief justice's decision, but it is expected to be the collective decision of a collegium of judges. As it is now a settled law that the judiciary has primacy in appointment and transfer of judges, the question that raised is whether the changes contemplated by the impugned amendment and the NJAC Act retains the primacy of judiciary and if not would it violate the basic structure of the Constitution?

The contention of the respondents was that three of the six members of the NJAC were *ex officio* members drawn from the judiciary - the Chief Justice of India, and two other senior judges of the Supreme Court, next to the chief justice. Only one member out of other three belongs to political executive *i.e*., Union Minster for Law and Justice. The remaining two members were eminent persons who are politically neutral. As a result, the primacy in appointment and transfer of judges is still with the judiciary.

Rejecting this contention, the court held that mere inclusion of chief justice and two more judges into the NJAC would not automatically retain the supremacy with the judiciary. It is pertinent to note that section 5 (2) of the NJAC Act says that commission cannot recommend a person for appointment if any two members of the commission do not agree for such recommendation. A situation could arise where all three judges' recommendation of appointment of a person as a judge could be stalled by any two persons under the above section. Such a provision seriously undermined the primacy of the judiciary. Even two eminent persons who are lay persons could defeat the unanimous recommendation made by the Chief Justice of India and the two senior most judges of the Supreme Court.

Union Minister of Law and Justice as one of the members of NJAC would have serious repercussions since the executive has a major stake, in a majority of cases,

which arise for consideration before the higher judiciary. Participation of the union minister as an *ex officio* member of the NJAC in appointments and transfer would be clearly questionable in view of higher judiciary's role in judicial review of administrative and legislative functions.

A submission was made to the court that in many countries, the appointment of judges is left to either executive or a special judicial appointments commission. No other country has this practice of judges appointing themselves. And further that, in all the countries, the executive had a role to play in the selection and appointment of judges. The purpose of such comparison was to demonstrate the fact that executive participation in the process of selection and appointment of judges had not made the judiciary in any of these countries, subservient to the political-executive.

However, the court rightly pointed out that across the world freedom of judiciary from the executive and political control is a well-established norm. It generally accepted that the process of judicial review had become an integral part of constitutions and to strengthen the judicial review, the trend is to free the judiciary from executive and political control, and to incorporate a system of selection and appointment of judges, based purely on merit.

It is imperative to minimise the role of the executive in appointment of judges particularly in the Indian scenario where there is an express provision of mandatory consultation with the chief justice is expressly recognised by the Constitution.

The power to nominate two eminent persons was vested with the prime minister, leader of the opposition in the Lok Sabha (and in case of there being one, the leader of the single largest opposition party in the house of the people), would be a retrograde step. Though chief justice would be a third person in the panel in selecting the eminent persons, the NJAC Act postulates neither any positive qualification nor disqualification. As a result nomination of two eminent persons would depend on the free will of the nominating authorities. Is it appropriate to leave the issue, to the free will and choice, of the nominating authorities? Answering the question in negative the court held that such an important issue cannot be left to the free will and choice of the nominating authorities, irrespective of the high constitutional positions held by them.

Further the court pointed out that appointment of judges being a significant constitutional power could not solely be left to the moral strength of individuals. The judiciary has to be manned by people of unimpeachable integrity, who can discharge their responsibility without fear or favour. Therefore, the court made it clear that it would not accept any alternative procedure, which does not ensure primacy of the judiciary.

Based on the above observations, the court declared that articles 124A(1)(a) and (b) are unconstitutional and struck down as being violative of the "basic structure" of the Constitution of India as the new amendment failed to ensure primacy of the judiciary in the matter of selection and appointment of judges to the higher judiciary.

It is pertinent to note that on whole the judgment seems to be justified due to the fact that the executive interference by way of involving the Union Law Minister and two eminent persons in the NJAC would primarily undermine the independence of the judiciary. This apprehension seems to be valid due to the fact that many of the

appointments that were made in the recent past by the executive were marred with several controversies.[15]

To support such a notion the court made an elaborate discussion on how reciprocity across the human cultures creates pulls of gratitude and loyalty by the appointee towards the appointer. The court taking this into the account endorses the views that as far as possible, the involvement of executive in final selection of judges should be avoided. Reciprocity and feelings of pay back would be disastrous to"independence of the judiciary".

However Chelameswar J raised very important issues through his dissenting judgment. The fundamental question he raised is that when judicial independence from executive in terms of appointment is so zealously protected, how far the judiciary would be able to ensure its independencein other aspects. Does the second judge's case remove the dependency entirely or merely transferred the dependency from executive to judicial hierarchy.

He agrees that the existence of an independent judiciary is an essential requisite of a democratic republic. He further says that there is no dispute about the preposition that an independent judiciary is one of the basic features of the Constitution of India. The issue is what is and how to preserve and establish an independent judiciary.

The competency of the judiciary is also as important as the independence. Independence presupposes two things; one independence of the institutions and second the individuals who man the institution. Therefore, independency of judiciary is not merely independence from the executive but also a state of mind or attitude in the actual exercise of judicial functions. As a result any amount of independence from the executive would not be effective unless the people manning the judiciary are efficient, incisive and committed. Issues like individual ambition, loyalty-based on political, religious or sectarian considerations, incompetence and lack of integrity make a judge pliable in spite of highest independence from the executive.

Chelameswar J rightly points out that that the judiciary must be both independent and competent. He warns that the general tendency is that men in power appoint least competent people with a hope that they would be loyal to the benefactor. Therefore, it is dangerous to confer an unchecked power of choosing or appointing judges on the executive. For the same reason concurrence of the legislature, it is also not desirable as there would be the possibility of influence based on political considerations or under political pressure. However, conferring such a power to the chief justice or collegium is also as dangerous as the other because even chief justice or the members of the collegium are also susceptible to above mentioned maladies.

Independence of judiciary as a basic feature does not confer any fundamental or constitutional right in favour of individuals. It only creates acollective right in favour of the polity to have a judiciary whichis free from the control of the executive or the legislature. The replacement of existing system of appointment of judges to the constitutional court by NJAC may enable the executive to pack the court with

15 See M.R.K. Prasad, "Constitutional Law – II", L *ASIL* 375, 376, (2014).

persons who are likely to be lessindependent. It is not the first time that an effort was made to create NJAC. M.N. Venkatachaliah Commission J also recommended creation of a NJAC but with a slightly different composition[16]

Indian Constitution though does not strictly follow the doctrine of separation of powers nonetheless provides for checks and balances on the three branches of government legislature, executive and judiciary. Such a constitutional arrangement has become a basic feature of all democratic constitutions. Hence absolute independence of any one ofthe three branches is inconsistent with coredemocratic values and the scheme of our Constitution.

Interference of executive with unfettered discretion in appointment of judges could no doubt hamper independence of thejudiciary. A similar power to courts in appointing themselves would also undermine the basic constitutional principles of separation of powers. In fact the new amendment actually promotes the separation of power by way of removing the discretion of the executive and adding members of civil society which would actually strengthen the doctrine of separation of powers. Introducing civil society members into the process of selection of judges would put a check on the practice of trade-offs between judiciary and executive.

The apprehension that the executive would have the opportunity of appointing its cronies to the constitutional courts finds no base. The presence of three senior most judges including Chief Justice of India is an adequate safeguard against such possibility as any two of the three judges can stall such an effort, if ever attempted by the Executive. Even Fali Nariman who represented the petitioners in this case is wary about the collegium system. In his book before *Memory Fades – An Autobiography*, he observes that he regrets the win in *Second judges* case and is very critical about the collegiums system.[17]

16 The matter relating to manner of appointment of judges had been debated over a decade. The Constitution (Sixty-seventh Amendment) Bill, 1990 was introduced on 18th May, 1990 (9th Lok Sabha) providing for the institutional frame work of National Judicial Commission The National Judicial Commission for appointment of judges of the Supreme Court shall comprise of:

i. The Chief Justice of India, Chairman
ii. Two senior most judges of the Supreme Court: Member
iii. The Union Minister for Law and Justice: Member
iv. One eminent person nominated by the President after consulting the CJI Member

17 See Fali S. Nariman, *Before Memory Fades – An Autobiography* 389 – "If there is one important case decided by the Supreme Court of India in which I appeared and won, and which I have lived to regret, it is the decision that goes by the title – *Supreme Court Advocates-on-Record Association vs Union of India.* It is a decision of the year 1993 and is better known as the *Second Judges Case*." - "I don't see what is so special about the first five judges of the Supreme Court. They are only the first five in seniority of appointment – not necessarily in superiority of wisdom or competence. I see no reason why all the judges in the highest court should not be consulted when a proposal is made for appointment of a high court judge (or an eminent advocate) to be a judge of the Supreme Court. I would suggest that the closed-circuit network of five judges should be disbanded. They invariably hold their 'cards' close to their chest. They ask no one. They consult no one but themselves." *Ibid* at 400.

Till the new amendment only two parties are involved in appointment of judges, executive and judiciary. The amendment included the third civil society members. The significance of amendment could be seen in three ways. *Firstly*, the primacy of the judiciary in appointment of judges is whittled down. *Secondly*, the members of civil society are made part of selection process. The role of the executive is thus further curtailed.

Historically, judiciary never enjoyed any primacy in appointments and even constitutional norms never suggested such a primacy on any one organ. Hence independence of judiciary could be a basic feature of constitution, but equating it with primacy of judiciary in appointment of judges is far-fetched. Further as pointed out by Chelameswar J that like judiciary is not the only constitutional organ that protects liberties of the people, primacy to the opinion of the judiciary in the matter of judicial appointments is not the only mode of securing independence of judiciary for the protection of liberties.[18]

Hence, asserting the primacy of judiciary in appointments as a basic structure is not only fallacious but also against the principles of separation of powers. There is no historical evidence to support the notion of basic structure constitutionally or normatively. Further, a system which is absolutely opaque and inaccessible to the public needs a fundamental change. Ironically, even the majority judgment acknowledges this fact. Unfortunately it is a missed chance to cleanse the system, strengthen the democracy and most importantly to bring back the faith of a common man on justice delivery system.

All powers can be misused and judiciary is no stranger to this. So the idea is not to deny the power but to regulate and structure in such a way as to minimise potential abuse. The amendment and the Act is one such attempt. If there are flaws in such an attempt, the judiciary could have guided the legislature to rectify it instead of altogether denying it. The judgment revives the same opaque system of collegiums. There is no doubt that Indian judiciary has provided services and stood tall against the executive excesses. Judicial independence from executive is important but one has to keep in mind that independence also require the judges to be fearless of other power centers, economic or political, and freedom from prejudices acquired and nourished by the class to which the judges belong.

While deciding the case the majority judgment agreed to consider the incorporation of additional appropriate measures, for an improved working of the collegium system. Several recommendations were made in this regard and to compile them systematically, a two member committee was constituted. The committee presented the compilation on 5th November, 2015. However, in *Supreme Court Advocates-on-Record Association* v. *Union of India*,[19] several persons including the

18 See also, *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27; *Union of India* v. *Sankalchand Himatlal Sheth* (1977) 4 SCC 193; *ADM Jabalpur* v. *S.S. Shukla*, AIR 1976 SC 1207 amply show how even the judiciary faltered when it matters.

19 (2015) 43 SCD 188.

Bar Council of India made a request to the Supreme Court to extend the time so that all stakeholders can send their suggestions. Initially the court decided that this task would be undertaken by the court itself. However, the attorney general persuaded the court that it must distance itself from such an exercise as the formulation of the memorandum of procedure is the responsibility of the executive. He submitted that even the nine-judge bench in *Second Judge's* case gave the task of drawing up the Memorandum of Procedure to the Government of India. It is pertinent to note that whenever the Government of India prepares the memorandum of procedure and introduce amendments therein, the government always consults the President of India and Chief Justice of India.

Agreeing with the view of the attorney general, the court held that the Government of India may finalise the existing memorandum of procedure in consultation with the Chief Justice of India and he will take a decision based on the unanimous view of the collegiums. The court provided certain criteria such as eligibility, transparency in appointment process, establishment of the secretariat for each high court and Supreme Court and appropriate mechanism for dealing with complaints, also the memorandum of procedure may be provided for any other matter considered appropriate for ensuring transparency and accountability including interaction with the recommendee(s) by the collegium of the Supreme Court, without sacrificing the confidentiality of the appointment process. However, the court made it clear that above mentioned guidelines are only broad suggestions for consideration and supplementing the memorandum of procedure for the faithful implementation of the principles laid down in the *Second Judges* case,[20] and the *Third Judges* case.[21]

IV SPECIAL LEAVE TO APPEAL ARTICLE 136

The issue of propriety and the conceptualparameters and paradigms to exercise the power under article 136 has come once again before the Supreme Court in *Md. Ali @ Guddu* v. *State of U.P.*[22] It is a well settled law that article 136 does not expressly impose any limitations however, the court set certain limits to itself within which to exercise such power. Invocation of the power under article 136 was used sparingly and in exceptional circumstances.[23] One important question that recurrently arise in exercising jurisdiction under article 136 is, can Supreme Court reappraise the evidence and look into the credibility of the witness. In other words can the court assess the veracity of evidence that is already appraised by the trial court and high court? If so, on what grounds?

Explaining the circumstances in which reappraisal of the evidence can be undertaken by the apex court, it was held that generally the credibility of the witness

20 *Supra* note 10.
21 (1998) 7 SCC 739.
22 (2015) 7 SCC 272.
23 See *Arunachalam* v. *P.S.R. Sadhanatha* (1979) 2 SCC 297.

and the assessmentof the evidence by the high court is accepted as final unless, of course the appreciation of evidence and finding isvitiated by any error of law of procedure orfound contrary to the principles of naturaljustice. Elaborating further, the court has opined that the assessment of the evidence by the high court is accepted as final except where the conclusions recorded by the high court are manifestly perverse and unsupportable by the evidence on record.

V ARTICLE 142

Government advertisements be it central or state are in the rise. They use public funds and the primary intention of these advertisements is not to propagate government schemes but projection of individuals holding prominent posts in the government or a ruling political party. In *Common Cause* v. *Union of India*,[24] two registered bodies i.e. common cause and centre for public interest litigation approached the Supreme Court to restrain these practices and issue appropriate guidelines to prevent misuse of public funds in connection with suchadvertisements.

It was noted that the primary purpose of government advertisements is to inform the public of their rights, obligations, and entitlements as well as to give information about government policies, programmes, services and initiatives. Only such advertisements are permissible to use public funds. The court acknowledged that the dividing line between permissible advertisements and advertisements that are politically motivated may at times gets blurred. Therefore, it was felt that there is a need for appointment of a committee to study the matter and to suggest proper guidelines. Accordingly, a three member committee was appointed by the Supreme Court.[25] The committee after due deliberations submitted a comprehensive set of guidelines to the court. The petitioners prayed that these guidelines be issued as directions by the court under article 142 of the Constitution of India for enforcement until an appropriate legislation in this regard is brought into effect by the Parliament.

The power of the court to interfere with expenditure from public fund is justified by the court under article 14. It is a well settled law that all governmental actions could be tested under the concept of arbitrariness. Reasonableness under article 14 would be the ultimate test of all State activities where spending of public funds are involved. Court held that spending of public fund in any government activity which is notconnected with a public purpose would justify judicialintervention. Court can lay down guidelines under article 142 when the field is open and uncovered by any government policy. However, such parameters laid down by the court must be consistent with the objects enumerated by any of the provisions of part IV and those guidelines will hold good until the legislature or the executive bring appropriate policy.

24 AIR 2015 SC 2286.

25 Committee consisting of (i) N.R. Madhava Menon, former Director, National Judicial Academy, Bhopal (ii) T.K. Viswanathan, former Secretary General, Lok Sabha and (iii) Ranjit Kumar, senior advocate

The committee principally spells out five principles to regulatethe contents of advertisements, namely,

i) Advertising campaigns are to be related togovernment responsibilities,
ii) Materials should be presented in an objective, fairand accessible manner and designed to meet objectives of the campaign,
iii) Not directed at promoting political interests of a Party,
iv) Campaigns must be justified and undertaken in anefficient and cost-effective manner and
v) Advertisements must comply with legal requirements and financial regulations and procedures.

While approving the above guidelines the court also made certain recommendations which were not considered by the committee made it clear that these guidelines are not comprehensive and gaps, if any could be filled up by the executive.

This is another classic case where the judiciary has to step in for executive callousness in public expenditure and abuse of power. The court rightly pointed out the potential threat in awarding of advertisements to a media house that is supportive of the ruling party. It cautions against patronising any media house through awarding advertisements and insists that award of advertisements must be on an equalbasis to all newspapers who may, however, be categorized depending upon their circulation.

VI CONDUCT OF BUSINESS OF THE GOVERNMENT - ARTICLE 166 AND 77

Delhi International Airport Ltd v. *International Lease Finance Corpn.*,[26] in this case the appellant(DIAL) was empowered under section 22(i) (a) of the Airport Authority of India Act, 1994 to charge fees, rent *etc*. for the landing, housing or parking of aircraft. Respondent is a US based company providing leasing of aircrafts engines and related equipment. Kingfisher Airlines (KAL) operating commercial airlines in India failed to pay dues of using various airports towards the parking, landing and housing charges. These charges are staggering to a total of Rs.10,50,51,052.77 and other statutory charges and dues amounting to Rs.12,64,08,706.57 As result licenses of about eight aircrafts belonging to KAL was suspended and the aircrafts were detained. Respondent no.1 who leased some of these aircrafts to KAL, filed a writ petition in high court against the petitioners challenging the detention of aircrafts. During pendency of the writ petition, a meeting was held regarding release of the aircrafts of KAL by the airport operators. The meeting was attended by the representatives of various departments.[27]

26 AIR 2015 SC 1903.

27 The following members attended the meeting Ministry of Civil Aviation (MCA), Central Board of Excise & Customs (CBEC), Director General of Civil Aviation (DGCA), Airports Authority of India (AAI), Delhi International Airport Pvt. Ltd.(DIAL), Mumbai International Airport Pvt. Ltd. (MIAL).

One of the important decisions taken in the meeting was that the concerned airport operators shall release all the de-registered aircraft to the respective owners/ lessors immediately so that these aircraft scan fly out of the country. However, the operators are at liberty tocollect parking charges from the owners/lessors from the date of de-registration. In case any of these de-registered aircrafts are the subject matter of any court case between the owners/lessors and the airport operator, then the airport would take action as per the decision of the court.

The High Court of Delhi by taking the minutes of the meeting into consideration directed all the airports to release the aircrafts in accordance with the terms of the decision taken in the meeting. Being aggrieved, the appellant-DIAL has preferred this appealby way of special leave. The basic issue involved in this case is whether minutes of the meeting amount to the decision of the union government and whether it could override the statutory regulations. The contention of the appellant was that the minutes of the meeting were not a general or aspecial order passed by the Central Government and does not have statutory force. However, the union government contended that the minutes of the meeting was the decision of the Central Government which was in accordance with law and Central Government had the sole prerogative to take such a decision, and that the appellant cannot questions its authority.

Conducting of business of Government of India was dealt with by article 77 of the Constitution of India, while article 166 of the Constitution deals with the conduct of business of the government of the state. As per these articles all executive actions of the Government of India and the government of a state are required to be taken in the name of the President or the Governor of the concerned state as the case may be.

Further, clause (3) of article 77 authorises the President to make rules for the more convenient transaction of government business and for the allocation ofthe same amongst ministers. Article 166(3) confers a similar power to governors to make rules for the conduct of government business in the states.

The rules of business and allocation among ministers are relatable to articles 53(1) and 154(1). These articles expressly states that the executivepower shall be exercised by the President or the governor either directly or through the subordinate officers. The government of India (Transaction of Business) Rules, 1961, divides the government business amongst the ministers and specific functions are reallocated to different ministries. As per these rules each ministry can issue orders or notifications to perform their specific functions. Rule 3 allows the minster in charge to issue general or special directions. Rule 4 provides inter-departmental consultations where the issue is involved more than one department. It imposes a condition that no decision can be taken unless all the departments have been agreed for such decision.

In case of no concurrence, the decision shall be taken by the cabinet. The most important restriction on exercising the power by the ministries is that, if such decision involves any expenditure, no department shall without the previous concurrence of the Ministry of Finance, issue any orders. In this backdrop, the minutes of the meeting between various departments would be binding on the appellant has to be determined.

In *Gulabrao Keshav Rao Patil* v. *State of Gujarat*,[28] dealing with a similar question the Supreme Court held that the decision of a minister under the business rules is not final or conclusive until the requirements in terms of clauses (1) and (2) of article 166 are complied with. In the present case the issue is related to different departments, under the rule 4 the impugned decision should have beentaken by the concerned committee of the cabinet. Further, the decision involves financial bearing and it requires the concurrence of finance department also.

When a provision was not made in the Appropriation Act, 2016 any proposal which involves concession or any other financial implication on the government shall require the concurrence of the finance department. To make such decision, it further required that the proposal need to be placed before the council of ministers and/or the chief minister and only after a decision is taken in this regard that it will result in the decision of the state government.[29] Such an elaborate procedure is mandatory for a democratic set-up and the decision of the government must reflect the collective wisdom of the council of ministers. If the decision was taken solely by the minister, any notification issued upon such decision will not make it a government decision.

Hence, the court rightly held that the minutes of meeting which is to be converted as a general or special order in writing by the Central Government, without concurrence of finance department has no constitutional validity. Such a decision cannot be finalised merely at the level of officers/representatives of concerned departments. It was further held that after concurrence of the Finance Ministry, the minutes of the meeting ought to have been placed before the concerned minister as per the rules of business. Since sanctification by the concerned ministry and the concurrence of finance department was a mandatory condition in order to hold the minutes of the meeting a general or special order in writing by the Central Government the impugned minutes have no binding on the appellant.

The decision of the court seems to be not only logical but also have far reaching implications. It restricts the abuse of executive power. If these kind of aberrations are allowed, then every decision of an individual minister would treated to be those of the state government within the meaning of article 154 of the Constitution, and the result would be chaotic. The ministers will be free to act on their own by keeping the business rules at bay.

In *Lalaram* v. *Jaipur Development Authority*,[30] a meeting of a high powered body under the chairmanship of the Minister of the Department of Urban Development, Rajasthan was held to resolve issues of land acquisition and payment of compensation. In the said meeting several cases of land was discussed and decided that in cases wherecompensation amount awarded had not been paid, though award hadbeen passed, one more opportunity to the khatedars to opt for developed land ought to be afforded

28 (1996) 2 SCC 26.
29 *MRF Limited* v. *Manohar Parrikar* (2010) 11 SCC 374.
30 2015 AIR SCW 6849; (2015) 43 SCD 146.

and on the basis of the merit ofsuch claims, 15% developed land be allotted to them. Based on the said meeting a circular to that effect was issued.

The appellants exercised their options and submitted their applications within the time allowed for being allotted15% developed land in lieu of the compensation payable to them. An issue regarding the validity of this circular was raised on the ground that the said circular had not been issued in the name of the governor of the state as required under article 166(1) of the Constitution of India and was not authenticated by the Governor as mandated under article 166(2).

It was held that article 166(1) only prescribed the mode in which an executive act is to be expressed. Both clause (1) and (2) of article 166 is not mandatory so much so that non-compliance automatically would render the executive action invalid. If the executive action is otherwise valid in terms of the rules of business framed under article 166(3), mere omission of declaring the same in the name of the governor would not make it invalid. Normally executive actions are required to be officially notified or to be communicated in the name of governor as mentioned in article 166(1) of the Constitution of India.

However, every executive action need not be formally expressed in the name of the governor. An omission to authenticate an executive decision in the name of the governor does not per se make the decision illegal. Such an expansive interpretation would result in serious general inconvenience or injustice to persons who have no control over those entrusted with the duty. Elaborating on this reasoning the court held that the effect of strict compliance requirements of article 166 would simply give immunity from challenging them on the ground that it was not an order made by the governor. In the present case the departmental minister was in exclusive charge and was competent to take a final decision on the issue of acquisition of land. Therefore, the circular that was issued based on the minutes of the meeting comply with the rules of business. Thus, the said circular indeed does represent an enforceable state policy. As the state already acted upon such circular, state cannot be permitted to resile from its policy.

VII DISQUALIFICATIONS OF MEMBERS OF LEGISLATIVE ASSEMBLY ARTICLE 192

In *Election Commission of India* v. *Bajrang Bahadur Singh*,[31] the respondent was a member of Legislative Assembly of Uttar Pradesh. After election he entered into four contracts with the State of Uttar Pradesh, and performed his obligations arising under the said contracts. Subsequently, Governor of State of Uttar Pradesh declared respondent as disqualified under article 192 of the Constitution of India read with section 9A of the Representation of the People Act, 1950 for entering and performing the contracts.

Accordingly, the secretariat of the legislative assembly declared that the constituency fell vacant and the Election Commission of India declared the election

31 (2015) 12 SCC 570.

schedule. The respondent filed a writ petition challenging the decision of the Governor and the election notification issued by the Election Commission of India. High Court of Allahabad passed an interim order staying the election process. Election Commission of India preferred an appeal by special leave to the Supreme Court of India against the interim order. In the special leave two contentions were raised.

i. The disqualification prescribed under section 9A[32] of the Representation of Peoples Act, 1955 applies only at the time of contest the election.
ii. Even if the respondent is disqualified for accepting the contracts, such disqualification ceased toexist, the very moment he performed the obligations arising out of the contracts.

Hence, he cannot be disqualified for continuing as a member of the legislature on a true and proper interpretation of section 9A of the Act.

However, article 192 empowers the Governor to disqualify any member of legislative assembly if the member has becomes subject to any disqualification mentioned in clause 1 of article 191and such decision of the Governor shall be final. The basic question that was raised in this case was whether the contracts render the petitioner disqualified from continuing to be a member of the legislative assembly. The court held that the contention of the respondent is not acceptable as it overlooks article 190 (3).

As the language used in article 192 is very clear that if a member becomes subject to any of the disqualifications mentioned in clause (1) or clause (2) of article 191, his seat shall thereupon become vacant. To put it differently the vacancy occurs the moment aperson incurs the disqualification by operation of law. In such a situation, the duration of the disqualifying event has no bearing and is irrelevant.

As it is a settled law that duration of the event has no bearing, the only issue is whether the member acquired disqualification on account of entering into four contracts with the State of Uttar Pradesh. The object and intent of section 9-A of the Act is to maintain the integrity of the Legislature and to avoid conflict of interest between duty and interest of Members of the Legislative Assembly and the Legislative Council. As it is clearly mentioned having a contract with the state as a disqualification, the Governor's order is valid.

Though not specifically raised any contention about the finality of the Governor's decision, the decision of the Governor disqualifying the respondent is under challenge

32 Representation of the People Act, 1950, s. 9A read: Disqualification for Government contracts, etc: A person shall be disqualified if, and for so long as, there subsists a contract entered into by him in the course of his trade or business with the appropriate Government for the supply of goods to, or for the executions of any works, undertaken by that Government.

Explanation-For the purposes of this section, where a contract has been fully performed by the person by whom it has been entered into with the appropriate Government, the contract shall be deemed not to subsist by reason only of the fact that the Government has not performed its part of the contract either wholly or in part.

before the high court. In such a case there is a possibility that the decision of the governor could be set aside. Meanwhile if bye elections were to be conducted by the Election Commission of India and a new candidate is elected for the same vacancy, there is a possibility of having two elected members for the same seat. This situation could arise due to statutory obligation to conduct bye-elections within six months from the date of vacancy on the part of election commission under section 150 and 151 A of Representation of Peoples Act, 1950.

The Supreme Court judgment tries to reconcile these two conflicting constitutional obligations. One of the methods is to fix the limitation period in which the Governor's order of disqualification can be challenged before the court. Till such period is fixed by law, the Supreme Court held that an aggrieved member must approach the high court by initiating appropriate proceedings, (if he is so desirous)within a period of eight weeks from the date of the decision of the governor. It further instructs that the said proceedings must be heard by a bench of at least two judges and be disposed of within a period of eight weeks from the date of initiation without fail. The court directs that the chief justice of the concerned high court will make an appropriate arrangement in this regard.

VIII POWER OF HIGH COURT ARTICLE 226 AND 227

Sumanyu Dudi v. *State of Punjab*,[33] deals with the power of the high court under article 226 to order a relief when the rules are silent. The petitioner in this case requested for revaluation of his answer book where in there is no provisions in the rules for such revaluation. The high court held that in the absence of any rules regarding revaluation no writ of *mandamus* can be issued and reevaluation of answer book is no more *res integra*.

In *Smt. Urmila Devi* v. *State of U.P.*,[34] the issue was the binding nature of precedents. The full bench of High Court of Allahabad held that decision of a co-ordinate bench binds a subsequent bench of the high court. If the subsequent bench also deals with similar issue and feels that the previous bench decision is erroneous or the previous bench failed to consider a correct legal position, the subsequent bench should refer the matter to a larger bench. Similarly, when a single judge bench disagrees with another single judge bench, the correct procedure is to refer the same to a division bench. The high court rightly held that this course of action is not a mere procedural requirement but a judicial propriety. This principle is based on public policy and to create a sense of consistency in judicial decision making.

In *High Court Bar Association* v. *High Court of Judicature at Allahabad*,[35] two fundamental issues were raised regarding the power of the court.

i. Can the court assume jurisdiction in matters not conferred upon the Court under the distribution of work by the chief justice?

33 AIR 2015 P&H 205.
34 AIR 2015 All 97.
35 AIR 2015 All 151.

ii. Whether a court hearing a petition can frame an issue and then answer the same although the issue may not arise for consideration in the proceedings before the court.

Answering both the questions in negative the full bench of High Court of Allahabad held that it is not open to a court to assume the jurisdiction when such jurisdiction is not conferred by the chief justice, and if at all it need to be decided, the proper course is to direct the registry to place the matter before the chief justice for appropriate action. With regard to the second issue, it was held that the adjudicatory power of the court is confined to issue which arise directly or incidentally. Hence, the issue that neither arises for consideration nor incidental to the actual issues that were raised can be adjudicated by the court. Such an exercise of powers would amount to violation of principles of natural justice.

An important issue regarding the power of high courts under article 227 had come before the Supreme Court in *Himalayan Cooperative Group Housing Society* v. *Balwan Singh*.[36] In this case the appellant, a co-operative society passed a resolution expelling the respondents from the membership of the society for default of payment. Their expulsion was confirmed by registrar of co-operative societies. The confirmation order of the registrar was challenged before the presiding officer, Delhi co-operative tribunal. However, on a later date, the respondentswithdrew the said appeal and preferred revision petition before the Financial Commissioner, Government of NCT of Delhi. The revisional authority dismissed the revision petitions upholding the confirmation order of the registrar. Aggrieved by the order the Respondents approached the high court under article 226. In the writ petition the respondent prayed to set aside the orders passed by the registrar and the revisional authority.

The high court while upholding the order passed by the registrar and revisional authority issued directions to the appellant society to consider the request of the respondents for construction of additional apartments. Such directions were issued by the high court as the counsel for the appellant society agreed for the same. The appellant-society preferred an appeal to the Supreme Court contending that in the writ petitions filed under article 226 read with article 227 of the Constitution of India, the high court was not justified in passing the incidentaland ancillary directions in respect of constructionand allotment of the additional flats/apartments tothe respondents. They further contended that they have not given any authority to the counsel to agree for such compromise. The basic issue that was raised in the case was regarding the jurisdiction of the court while dealing with a petition filed under articles 226 and 227 of the Constitution of India.

It was held that the issue is no more debatable in the light of judgment in *Jaisingh.* v. *Municipal Corporation of Delhi.*[37] In the said judgment the Supreme Court held that under article 227 of the Constitution of India undoubtedly the high court has the jurisdiction to ensure that allsubordinate courts as well as statutoryor quasi-judicial

36 AIR 2015 SC 2867; (2015) 7 SCC 373.
37 (2010) 9 SCC 385.

tribunals exercise thepowers vested in them, within the boundsof their authority. The jurisdiction under this article is wider than the power and jurisdiction under article 226 of the Constitution of India. However, this great power needs to be exercised with greater care and utmost caution and circumspection.

In the present case, the challenge was on the validity of the order passed by the registrar and the revisional authority and the prayer was to set aside the orders passed by the authorities, it is very clear that it requires exercise of supervisory jurisdiction and hence it could be treated as petitions filed under article 227 of the Constitution only. Once the high court on considering the merits come to the conclusion that the expulsion of respondents from the appellant-society was justified, it ought not to have issued the impugned directions merely because a request was made by the counsel appearing for the respondents. The court, while, exercising its powers under article 227 of the Constitution ofIndia requires confining itself to the subjectmatter and the issues raised by parties in the writ petition. If not, the court fears that the digression of or expansion of the supervisory jurisdiction under article 227 of the Constitution of India, would open precarious floodgates of litigation.

The power of high court in interfering with the findings of lower court had come up before the Supreme Court in *K.V.S. Ram* v. *Bangalore Metropolitan Transport Corpn*.[38] In this case the appellant was dismissed by Bangalore Metropolitan Transport Corporation on the ground that he had securedappointment by producing a false transfer certificate. In appeal, the labour court directed the management of the corporation to reinstatethe appellant in his original post with continuity of service but without back-wages. Labour court found that there was unreasonable delay of 12 years in completing the enquiry and in similar cases of other workmen who produced bogus certificates; they were reinstated in the service on withholding of few increments.

Aggrieved by the decision the respondent-corporation filed a writ petition before the high court. The single judge of the high court allowed the writ petition. In an appeal to the division bench, the appeal was dismissed on the ground that the charges are of serious nature and the punishment was proportionate to the misconduct. In an appeal to the Supreme Court the appellant raised the issue of correctness of the division bench decision and the power of the high court in interfering with the lower court's judgment under article 227.

Supreme Court reiterated its view that in exercise of its power of superintendence under article 227 of the Constitution of India, the high court can interfere with the order of the tribunal, only when there has been a patent perversity in the orders of tribunal and courts subordinate to it. The other grounds on which high court could interfere is a gross and manifest failure of justice or violation of basic principles of natural justice. Emphasizing that while exercising jurisdiction under articles 226 and/or 227 of the Constitution of India, the high court can interfere with the award only if it is satisfied that the award of the labour court is vitiated by any fundamental flaws. As in this case the labour court has exercised its discretion based on relevant

38 AIR 2015 SCW 865.

facts like unreasonable delay and the cases of similarly situated workmen, Supreme Court held that interference by the high court is bad in law.

IX DISQUALIFICATIONS LOCAL SELF GOVERNMENT

Local self-government is a key for decentralisation of power. It is the back bone of any successful democracy. Local bodies are in existence in India before the commencement of Indian Constitution. Before the Constitution these bodies are under the authority of the provincial governments. Article 40 of the Indian constitution mandates establishing panchayats. To effectuate such obligation of the state, Constitution authorised state legislatures under article 246(3) read with entry 5 of list II to make laws with respect to local self governments. Laws have been made from time to time by state legislatures establishing a three-tier panchayat system by 1980's. By way of Seventy Third Amendment Act, 1992 local bodies were given constitutional status.

State of Haryana enacted the Haryana Panchayati Raj Act, 1994 to give effect to 73rd Amemdment to the Constitution. However this Act was amended in 2015 by Panchayati Raj (Amendment) Act, 2015 and inserted five more categories of disqualifications forcontesting in elections for any one of the elected offices under the Act. The categories includes the persons against whom charges are framed in criminal cases for offences punishable with imprisonment for not less than ten years, persons who fail to pay arrears, if any, owed by them to either a primary agricultural cooperative society or district central cooperative bank or district primary agricultural rural development bank, persons who have arrears of electricity bills, persons who do not possess the specified educational qualification and lastly persons not having a functional toilet at their place of residence.

Accordingly state election commission issued election notification for panchayats in State of Haryana. In *Rajbala* v. *State of Haryana,*[39] the petitioners who were interested in contesting the elections but disqualified on account of lack of educational qualification challenged the amendment act as violative of article 14 of the Constitution. The petitioners raised the contentions that the impugned provisions are wholly unreasonable and arbitrary and therefore violative of article 14 of the Constitution. They also contended that they create unreasonable restrictions on the constitutional right of voters to contest elections under the Act and create an artificial classification among voters (by demanding the existence of certain criteria which have noreasonable nexus to the object sought to be achieved by the Act), an otherwise homogenous group of people who areentitled to participate in the democratic process under the Constitution at the grass-roots level; and the classification sought to be made has no legitimate purpose which can be achieved.

The respondents raised a fundamental objection that contest an election is not a fundamental right under the Indian Constitution. They further contended that even

39 AIR 2015 SC 3142.

for the sake of argument right to contest in election is a fundamental right, such right is subjected to qualifications/disqualifications contemplated under article 243F and the said article authorises the state legislature to prescribe disqualifications for contesting election to any Panchayat and that prescribing qualifications is within the legislative competence of the state. After extensively quoting from various cases, the court held that right to vote and contest in the election though not a fundamental right was a constitutional right.

After examining various articles of the Indian Constitution, the court come to a conclusion that every person who is entitled to be a voter under article 326, is not automatically entitled to contest inelections. Constitution permits to impose several restrictions in the form of qualifications and disqualification on a voter to contest in various elections. Right of a voter to contest in any election would be subject to those qualifications and disqualifications. However these are not expressly applicable to panchayats as part IX of the Constitution does not contain any express provision comparable to article 326. It was observed that the text of article 326 does not cover electoral rights with respect to panchayats. In such a case the following questions need to be answered in the light of above conclusion.

i. Whether a non-citizen can become a voter or can contest and get elected for panchayats?
ii. In the absence of any express provision, whatis the minimum age limit by which a person becomes entitled to a constitutional right either to become a voter or get elected to panchayats?
iii. Are there any constitutionally prescribed qualifications or disqualifications for theexercise of such rights?

Unfortunately the court refused to deal with questions no.(i) and (ii) though they were the issues in the case. However, the court examined at length the third question. The court opined that that the rules that apply for contest in the elections to the legislatures would apply to panchayats. In other words, the qualifications and disqualifications relevant for membership of the Legislature would apply to membership of panchayats.

Further, article 243F authorises the concerned state legislature to stipulate disqualifications for being a member of panchayats. As result, right to vote and right to contest at an election to panchayats are constitutional rights due to part IX of the Constitution of India. Hence these rights can be regulated by the appropriate state legislature directly and Parliament indirectly by prescribing disqualifications for membership of the legislature of a state.

With regards to the contention that the amendment Act is arbitrary and hence violates article 14 did not find favour with the court. Based on previous judgments, it was held that legislation cannot be declared unconstitutional on the ground that it is "arbitrary". Declaring legislation unconstitutional on ground of arbitrariness would amount to value judgmentand courts do not examine the wisdom of legislative choices in the absence of any specific violation to a provision of the Constitution.Undertaking such action, court felt, would amount to virtually importing the doctrineof "substantive due process" employed by the American Supreme Court. It was also pointed out that even in United States the doctrine of arbitrariness is currentlyof doubtful legitimacy.

Whether the classification created by each of the five clauses amounted to an unreasonable classification as there was no intelligible difference between the two classes and such classification had no nexus with the object sought to be achieved was answered negatively.

The education qualification clause prescribes a minimum educational qualification of matriculation for anybody seeking to contest an election. However, this qualification is lowered for candidates belonging toscheduled castes and women to middle-pass. A further relaxation is granted in favour of the scheduled caste woman. As a result, this clause would have the effect of disqualifying more than 50% of the population from contesting in the election to panchayats. The percentage would be high in cases of poorer section, women, schedule castes and scheduled tribes. When a provision of the Act disqualifies a large number of the population from contesting, wouldn't it be violative of the equality before law under article 14?

Surprisingly the court felt it is not. The clause creates two classes of voters; who are qualified due to educational accomplishment and who are not qualified due to lack of educational qualifications. The proclaimed object of suchclassification according to the court is to elect educated persons to panchayats and the education enables them to more effectively discharge various duties which befall the elected representatives of the panchayats. Therefore, it was held that the objects ought to be achieved cannot be said to be irrational or illegal or unconnected with the scheme and purpose of the clause or provisions of part IX of the Constitution. It was further held that only education gives a human being the power to discriminate between right and wrong, good and bad. Hence, prescribing educational qualification for contesting in election is not irrelevant for better administration. Since there is a nexus between the qualification and the object of the clause, the said educational qualifications do not amount to violation of article 14.

With regard to disqualifications on ground of indebtedness and arrears, the court held that Constitution itself imposes limitations on the right to contest on ground of undischarged insolvents to Parliament and legislatures of the states. If it is constitutionally permissible to debar undischarged insolvents from contesting elections, there is no reason why persons cannot be disqualified from contesting elections to panchayats on ground of indebtedness and arrears. The court found no favour to the arguments that in rural India farmers commit suicide due to lack of money to repay the debts, as there is no relevant evidence to show that there are such candidates intended to contest election. However, equating the indebtedness to insolvency seems to be unfair.

Clause (w) disqualifies a person who has no functional toilet at his residence. The arguments of petitioners that a large number of rural populations simply cannot afford to have a toilet at theirresidence due to economic inability found no favour from the court. It was held that disqualifying them from contesting elections would not make an unreasonable classification. Court observed that people still do not have a toilet not because of their poverty but due to lack of civic sense.

It was further observed that one of the basic functions of the local bodies is to maintain sanitation within its jurisdiction. If the contesting candidates do not have a functional toilet how could they implement the sanitation? The aspiring candidate must set an example for others. Further, the state having provided adequate financial assistance to those whodo not have toilet facility for construction of toilet, hence, this provision is not unreasonable in any manner.

However, there is a mounting criticism against the law and many feel that instead of empowering the communities, state penalises them by restricting them from contesting the elections. Right to contest in election empowers the communities more than mere allowing them to vote in elections.[40] Further the timing of the legislation is highly questionable as the law was brought into force just a month before the polls. Even Supreme Court erred in declaring educational qualification as a valid condition. Though, no one questions the value of the education, there is no study conducted on whether lack of education hampers efficiency of administration. In the absence of any evidence, the educational requirement is irrational particularly in the light of reports that large number of posts that haven won unopposed or gone vacant due to these requirements. It was found that out of 6,207 sarpanch elections across Haryana, 274 were won unopposed and 22 went vacant. A similar finding was recorded in Rajasthan where the January-February 2015 election saw 260 sarpanchs getting elected unopposed, compared to 35 in 2010.[41]

The statement of objects and reasons for giving panchayats and municipalities a constitutional status shows that the respective amendments to the Constitution were made with an intention of making local bodies to function as vibrant democratic units of self-government.

The principle of representative democracy is lost due to these restrictions as people cannot elect them as representatives who are otherwise eligible. Further, disqualifying people from contesting in election due to lack of educational qualifications when it is the duty of the state to implement constitutional mandate of providing free and compulsory education within in 10 years from the date of commencement of constitution to persons below the age of 14 years amount to double discrimination. These rules are ironical in a sense when there are no such disqualifications for elections of MPs and MLAs. In other words MPs/MLAs can be illiterate, charge sheeted but not Panchayat representatives.

One has to understand that a sarpanch in a village plays a different role than the elected Member of Parliament and state legislatures. They are more than people's

40 Others such as activist Jagmati Sangwan of All India Democratic Women's Association (AIDWA) calls the legislation a "black law" that has disenfranchised over 83% of dalit women (the worst affected), 72% of dalit men, 71% of general category women and 55% of general category men on just the education clause in Haryana alone. See Namita Bhandare, What has education got to do with Panchayat Politics? *available at*: http://www.livemint.com/Politics/Qpd0yXsMHvlmGDN3foOALM/What-has-education-got-to-do-with-panchayat-politics.html (last visited on May 20, 2016).

41 *Ibid.*

representatives and bearers of local common and cultural knowledge and experience and are closely connected with their constituency. It is paradoxical that MPs and MLAs can legally declare their liabilities in their election affidavits but panchayats members require clearance certificates.[42] All the electoral reforms be it reservations to women, applying small family norms or educational qualifications are applied to representatives of local self-government and the same were never applied to members of state legislatures and Parliament. This creates double standards and makes us wonder why similar qualifications are not made mandatory for MLAs and MPs.

X COOPERATIVE SOCIETIES

The cooperative movement in India is a 20th Century development. However, the cooperatives in India lacked autonomy and were marred with issues such as unprofessional management and undemocratic practices. In 2002 a National Policy on cooperatives was announced. The Ninety Seventh Amendment to the Constitution of India gave a constitutional frame to this policy. The amendment raised the status of cooperatives to fundamental rights under article 19. Apart from that, article 43b imposed an obligation on the state to promote cooperative societies under the directive principles of state policy. In addition to this, the Amendment also introduced a new part IXB on cooperative societies. To bring uniformity, articles 43B and 243ZT imposed a mandatory obligation on all the states and the competent authorities to structure cooperative societies as conceived in the Constitution of India. In spite of these directives, many states failed to bring the existing laws in conformity with part IXB.

In *Vipulbhai M. Chaudhary* v. *Gujarat Cooperative Milk Marketing Federation Limited*, [43] one of the issues raised was, in the absence of provisions regarding removal of chairperson and other elected office bearers in the Act, rules or even bye-laws of a cooperative society, can they be removed by a motion of no confidence?

Though such a question seems to be simple, is indeed very complex in nature as the issue would be whether the court can supply the rules in the absence of a legislative provision. The court while answering the question affirmatively held that all laws on cooperative societies are expected to be made in consonance with the Ninety Seventh Amendment of the Constitution of India and, if any provision in the Act or rules or bye-laws of cooperative societies that is inconsistent with the Constitution will be inoperative. The entire gamut of the amendment is to infuse democratic practices in the cooperative societies. The court observed that "the bedrock of democratic accountability rests on the confidence of the electorate. If the representative body does not have confidence in the office bearer whom they selected, democracy demands

42 The top 10 MLAs, according to 2014 election affidavits, have reported liabilities ranging from Rs 43 crores to Rs 3 crores in the Haryana Assembly. *Available at*: http://indiatoday.intoday.in/story/over-83-percent-newly-elected-haryana-mla-are-millionaires/1/396826.html (last visited on May 25,2016).

43 (2015) 8 SCC 1.

such officer to be removed in a democratic manner." Once a person was elected to an office through democratic process, the same person could be removed when that person looses the confidence of the members who chose them. This would be the norm even when there is no express provision regarding no-confidence. This inference was based on supposition that once the cooperative society is bestowed with a constitutional status, it is expected to rise to the constitutional aspirations.

It is the fundamental obligation on the state legislature to ensure democratic functioning of the cooperatives. When there is failure on the part of the states in democratising the cooperatives, it is for the court to read the constitutional eloquence into the provisions of cooperatives. In view of the express mandate of article 243ZT, the court steps in and infuses the constitutional requirements into the existing provisions. Therefore, the removal of members by no-confidence though not expressly provided in the Act, rules or bye-laws, can be drawn by the court.The court could instill the constitutional mandate of functioning on democratic principles in the respective Acts or rules or bye-laws both on the principle and procedure.

As a result even when there is no expressprovision under the Act or rules or bye-laws for removal of an office-bearer, such office-bearer is liable to be removed in the event of loss of confidence by following the same procedure by which he was elected to office. After analyzing various legislations enacted by the states relating to cooperatives the court having found that the relevant statutes have not carried outthe required statutory changes in terms of the constitutionalmandate, felt the necessity to laydown the following guidelines.

i. In the case of cooperative societies registered under any central or state law, a motion of no-confidence against an office bearer shall be movedonly after two years of his assumption of office.
ii. In case the motion of no-confidence is once defeated, a fresh motion shall not beintroduced within another one year.
iii. A motion of no-confidence shallbe moved only when there is a request from one-third of the elected members of the board of governors/managing committee of the cooperative society concerned.
iv. The motion of no-confidence shall be carried in case the motion is supported by more than fifty per cent of the elected members present in the meeting.

This is yet another classic case of failure of state in promoting the constitutional mandate and the Indian judiciary promptly stepping in to fill the void left by the executive and the legislature.

XI REPUGNANCY - ARTICLE 254

In *Kalyani Mathivanan* v. *K.V. Jeyaraj*,[44] the issue was whether the regulations passed by UGC are binding on the state universities. The appellant was appointed as Vice-Chancellor of Madurai Kamaraj University. Her appointment was challenged

44 AIR 2015 SC 1875.

by the respondents on the ground that she did not satisfy the eligibility criteria stipulated by the UGC Regulations of Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education 2010 (UGC Regulations, 2010)

The appellant contended that she was qualified for appointment as Vice-Chancellor as per the Madurai Kamaraj University Act, 1965 (University Act). The main contention of the appellant was that the UGC Regulations, 2010 are being only directory cannot override the provisions of the university Act. It is true that the University Grants Commission (UGC) has been established for the determination of standard of universities, promotion and co-ordination of university education and also prescribes the qualifications regarding the teaching staff of the university.

Under the UGC Act,[45] UGC is empowered to frame regulations in these respects. However, such regulations need to be approved by the Parliament to give effect to them. Therefore, the contention of the appellant that the UGC regulations are subordinate legislation and hence not binding on the Universities is not correct. Failure to comply with such guidelines would entail the UGC to deny the financial benefits to the erring universities. Hence, the court held that though UGC Regulations is subordinate legislation it has binding effect on the universities to which it applies.

UGC by Regulations in the year 2000 prescribes no qualifications for the post of 'Pro-Chancellor' or 'Vice-Chancellor'. As a result the Government of India, Ministry of Human Resource Development Department of Higher Education, in 2008 directed the UGC to implement the Scheme of revision of pay of teachers and equivalent cadres in Universities and colleges based on the recommendations of the Sixth Central Pay Commission. The government gave extensive guidelines regarding the designation of teachers, service conditions and career advancement scheme. It was intimated that the said Scheme may be extended to the universities, colleges and other higher educational institutions coming under the purview of state legislature, provided state governments wish to adopt and implement the scheme.

As per these directives UGC enacted Regulations, 2010 in supersession of the UGC Regulations, 2000. These regulations also prescribed the minimum qualifications for selection of Vice-Chancellor of Universities. As per the new Regulations 2010 vice-chancellor should be a distinguished academician with a minimum of ten years of experience as professor in a university system or ten years of experience in an equivalent position in a reputed research and/or academic administrative organisation. Whereas the post of vice-chancellor under University Act and statute made thereunder did not prescribe it as a teaching post, but as an officer of the university and has prescribed no such qualifications.[46]

45 See The Madurai-Kamaraj University Act, 1965, s. 12.

46 *Id*., s. 11: The Vice-Chancellor:

(1) Every appointment of the Vice-Chancellor shall be made by the Chancellor from out of a panel of three names recommended by the Committee referred to in sub-section

(2). Such panel shall not contain the name of any member of the said Committee.

Therefore the contention was that there was repugnancy between the UGC Regulations 2010 and University Act. To decide such repugnancy it is necessary to assess the legislative competence of the Parliament and state legislature under article 246 read with seventh schedule of the Constitution of India. Entry 66 in list I provides for co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions. Prior to Constitution 42nd Amendment, education including universities subject to the provisions of the entries 63, 64, 65, 66 of list-i and entry 25 of list III was shown in entry 11 of the list II. However by 42nd Amendment of Constitution from January 3, 1977, entry 11 of the state list was added as entry 25 of concurrent list.

In this connection the repugnancy of state law with the law made by the Parliament need to be assessed as per article 254. It is a settled principle that in case of inconsistency between the legislation made by the Parliament and the state legislature on the subject covered by list III[47] state competence under list III entry 25 to control or regulate higher education is subject to standards laid down by the Union of India. It was held that the standards of higher education can be laid down under list I entry 66 by the central legislation. Hence the judgment makes it clear that to the extent the state legislation is in conflict with central legislation including sub-ordinate legislation made by the central legislation under entry 25 of the concurrent list shall be repugnant to the central legislation and would be inoperative.

Thereon, the question that arose was whether any of the provisions of the University Act and the statutes framed thereunder was in conflict with the UGC Regulations, 2010.

The court held that the post of vice-chancellor under the University Act, 1965 is a post of an officer. The UGC Act 1956 and the UGC Regulations, 2000 are silent in this regard. The provisions regarding vice-chancellor have been made under UGC Regulations, 2010 for the first time. As these Regulations, 2010 is not applicable to the universities, colleges and other higher educational institutions coming under the purview of the state legislature unless state government wish to adopt and implement the scheme, there no conflict arises. In the absence of any amendment to the UGC Act to incorporate the changes made by the UGC, the qualifications prescribed by the Regulation 2010 would not apply in the State of Tamil Nadu.

It is true that the UGC regulations being passed by both the houses of Parliament and a consequence, though the regulation is a sub-ordinate legislation but would have binding effect on the universities to which it applies.

The UGC Regulations, 2010 applies to all the central universities and colleges thereunder and the institutions deemed to be universities whose maintenance expenditure is met by the UGC. But they are not mandatory for universities, colleges and other higher educational institutions under the purview of the state legislation as the matter has been left to the state government to adopt and implement the scheme.

47 *State of Tamil Nadu* v. *Adhiyhaman Education & Research Institute* (1995) 4 SCC 104; *Preeti Srivastava* v. *State of M.P.* (1999) 7 SCC 120.

Thus, UGC Regulations, 2010 is partly mandatory and is partly directory. As State of Tamil Nadu did not adopt the UGC Regulations, 2010 the question of conflict between state legislation and statutes framed under central legislation does not arise. In view of these reasons court upheld the appointment of the appellant as Vice-Chancellor of Madurai Kamaraj University.

XII SERVICES ARTICLE 311

Civil servants in India enjoy constitutional protection against termination, removal or reduction of rank. Such a protection may be justified considering their involvement in administration. Due to this significant role, courts were often approached for violation of constitutional provisions in this regard. In *Ratnesh Kumar Choudhary* v. *Indira Gandhi Institute of Medical* Sciences[48] the appellant applied for the post of physiotherapist under class-II post in the Indira Gandhi Institute of Medical Sciences (IGIMS). However he was selected by the selection committee for the post of chest therapist as the committee felt that the post of physiotherapist and chest therapist are of similar nature.

Subsequent to his appointment a complaint was filed before vigilance department challenging the appointment as illegal. An enquiry was ordered in this regard and the same was conducted by the deputy superintendent of police. The report reflected on various aspects and pointed out that the appointment was illegal.

Based on the report the appellant was served a show cause notice by Director of IGIMS and three days' time was given for explanation. The appellant requested a copy of the complaint as well as the entire report submitted by the vigilance department. In spite of not receiving the copy of the complaint and report the appellant submitted his explanation. The Director IGIMS, terminated appellant's service stating that the appointment to the post of Chest Therapist was illegal as per the investigation done by the Cabinet (Vigilance Department, Bihar) and the explanation furnished by him was found unsatisfactory. Aggrieved by the termination the appellant filed a writ petition before the high court.

The single judge quashed the order on the ground that the appellant was not provided with the grounds of termination and there was also failure to furnish necessary documents. The single judge also opined that there had been violation of the principles of natural justice. However, on appeal, it was observed by the court that even though the appointment was made by the duly constituted selection committee, the authorities have come to a correct decision that the terms for physiotherapist and chest therapist are different and the selection committee has no power to decide the same. The division bench held that in case of illegal appointment it is not inclined to condone the illegality on the ground of no fraud committed by the applicant. Not satisfied with the order of the division bench, the appellate preferred an appeal to the Supreme Court.

48 (2015) 43 SCD 69.

The basic issues that were raised before the apex court were whether the order of termination passed by the authority was stigmatic or not; and whether there had been violation of principles of natural justice, for no regular enquiry was conducted and whether article 311 was violated.

Supreme Court held that the complaint was relating to illegal selection on the ground that the appellant did not possess the required qualification and the report did not confine to the qualification but also the conduct and character of the appellant. Further the authorities failed to supply necessary documents to enable the appellant to represent his case effectively. In the absence of any regular enquiry, dismissal of an employee amounts to punishment. It is a well settled principle that when an ex-parte enquiry is held behind the back of the delinquent employee and when here are stigmatic remarks in the report, termination without framing of charges or holding of an enquiry amounts to violation of principles of natural justice. Therefore, the court allowed the appeal and quashed the order passed by the division bench of the high court. Accordingly, it directed the respondents to reinstate the appellant in services within a period of six weeks and that he shall be entitled to 50% towards his salary which shall be paid to him within the said period.

In *Union of India* v. *S.N. Maity,*[49] the respondent who was working as a scientist e-II in the Central Mining Research Institute was appointed on deputation to the post of controller general of patents, designs and trademarks conducted by UPSC. His appointment order stated that he was appointed for a period of five years or until further orders, whichever was earlier from the date of assumption of the charge of the post. However he was repatriated to his parent department after serving there for one year. His premature repatriation was challenged before the tribunal for violation of the principle of *audi alteram partem* which is an essential condition under article 311. Union of India contended that he was appointed on deputation and hence had no right to continue in the post. The tribunal accepted the contention of Union of India and dismissed the petition.

Aggrieved by the order the respondent invoked the jurisdiction of the high court under article 226 and 227 of the Constitution ofIndia. High court held that repatriating him to the parent department in the absence of any reasonable or valid ground is arbitrary and thereby violated article 14 of the Constitution of India. Government preferred an appeal to the apex court. The issue was whether the reversion amounts to penalty and if so would it require compliance with article 311(2). It was held that the reversion in this case is not a simple transfer. It was not the case where the respondent was transferred on deputation from one cadre to another or from one department to another. The post for which the respondent was appointed was a different category and he had undergone the whole gamut of selection. Further it was a tenure posting and the appointment was made for five years. The court opined that merely using the words "or until further orders" would not confer the appellant the right to act in an arbitrary or capricious manner.

49 AIR 2015 SC 1008; 2015 AIR SCW 579.

It was held that the reversion being in the nature of penalty, the procedure under article 311(2) was required to be followed and as there was gross violation of the same, the order passed by the Government of India could not be sustained.Therefore there was no reason to interfere with the high court order.

With regards to the order of the high court directing the appellant to reinstate the respondent to the post of CGPDTM, the appellant contended that respondent had joined his parent department and was continuing on the same post. For the post of CGPDTM, new person has been duly appointed hence it would not be proper to reinstate the respondent. Considering the change of circumstances, the court held that implementing high court order would create an anomalous situation. Therefore in the interest of justice the appellant was directed to pay the entire salary that was payable to him for the post of CGPDTM for the balance period, that is, five years minus the period he had actually served and drawn salary. The balance amount was ordered to be paid with interest @ 9% p.a. within three months.

In *Ved Mitter Gill* v. *Union Territory Administration, Chandigarh,*[50] the Supreme Court was required to analyse the circumstances in which a civil servant could be terminated from service. The factual situation was that four high profile under-trials who were facing trial for the assassination of a former Chief Minister of Punjab Shri Beant Singh escaped from Model Jail, Burail, Chandigarh, by digging an underground tunnel. The advisor to the administrator, Union Territory, Chandigarh invoked clause (b) to the second proviso of article 311(2) of the Constitution of India, and dismissed the appellants/petitioners from service with immediate effect. The appellant/petitioners appealed to the administrator, Union Territory, Chandigarh. The appeal was dismissed by the administrator by holding that not holding an inquiry before dismissal is permitted under clause (b) of the second proviso under article 311(2) of the Constitution of India.

An appeal on this order was made to administrative tribunal and the same was dismissed by the administrative tribunal. Ved Mitter Gill filed petition before high court, which was also dismissed, and hence he appealed to Supreme Court by special leave petition. Supreme Court transferred the other writ petitions pending before the high court and clubbed them together with the special leave petition as the contentions of all the petitioners were the same.

The basic issue involved in all these petitions was whether the competent authority was justified in dismissing the appellant/petitioners without holding enquiry. Does the circumstance in the present case justify the invoking of clause (b) of the second proviso under article 311 (2).

The dismissal order by the competent authority mentions the reasons for invoking the exceptions under article 311. The order states that V.M. Gill is a senior, permanent and non-transferable official of the Model Jail, Chandigarh. The authority feels that all the witnesses, being junior jail officials would not come forward to depose against

50 2015 AIR SCW 2147.

him in disciplinary proceedings as long as he remains in the service. The authority also reasoned that the escaped under-trials are closely associated with a dreaded terrorist organisation Babbar Khalsa International, and no one would come forward to give any evidence due to fear of life. Even an independence assessment also confirms the same that the escaped under-trials pose a danger to the lives of the people.

Hence, based on these observations the authority is satisfied that the holding of an inquiry as contemplated by article 311 (2) (b) of the Constitution of India and the Punjab Civil Services (Punishment and Appeal) Rules, 1970 as made applicable to the employees of Union Territory, Chandigarh, was not reasonably practicable. Further, the grave omission on the part of Gill in allowing the under-trials to dig an underground tunnel of approximate length of 94 feet, there was no justification for the continuation in service of Gill as he has betrayed all responsibility placed upon him by law and rules. His misconduct was of such magnitude that the severest penalty permissible by law was called for. Hence the competent authority exercising the powers conferred by article 311 (2), concluded that it was not reasonably practicable to hold an inquiry, and dismissed V.M. Gill, from service with immediate effect.

After carefully considering the observations of the competent authority, the court held that the responsibility of jail inmates exclusively rests on the shoulders of the jail staff. On the evaluation of the duties and responsibilities of posts of Assistant Superintendent Jail, Head Warder and Warder, there remains no room for any doubt, about the other petitioners also, that they too were similarly responsible for securing the detention of all jail inmates. Within the jail premises, only the jail staff can be permitted to function. And in case of lapses within the jail premises, it is the jail staff alone which is responsible. Therefore there was a clear lapse on the part of the appellant/ petitioners. With regards to the issue whether it was reasonably practicable to hold an inquiry as contemplated under article 311(2) court held that application of said article require the satisfaction of three ingredients:

i. The conduct of the delinquent employee should be such as would justify one of the three punishments, namely, dismissal, removal or reduction in rank.
ii. Satisfaction of the competent authority, that it is not reasonably practicable to hold an inquiry, as contemplated under article 311(2) of the Constitution of India.
iii. The competent authority must record the reasons of the above satisfaction in writing.

In *Union of India* v. *Tulsiram Patel*,[51] the court explained that the condition precedent for the application of clause (b) is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the inquiry contemplated by clause (2) of article 311. Explaining the meaning of the words "not reasonably practicable" the court held that they cannot be equated to 'impracticable'. Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is

51 AIR 1985 SC 1416.

required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation.

The first requirement that the delinquency alleged should be such as would justify, any one of the three punishments, namely, dismissal, removal or reduction in rank is satisfied in this case as the primary responsibility of the inmates of the Jail is on the appellant. The lapses on the part of appellant/petitioners, clearly established their involvement with reference to the alleged delinquency and there by justifies the punishment of dismissal from service. The second ingredient of satisfaction of the competent authority, that it was not reasonably practicable, to hold a regular departmental enquiry, against the employees concerned, the authority explained the circumstances that make him to dismiss without enquiry is in writing. Court took the judicial notice of the fact that a large number of terrorists are acquitted during the period in question on account of witnesses not appearing or turning hostile due to fear. Hence the competent authority's observation that it would not reasonably practicable, to hold a departmental proceeding against the appellant/petitioners are made out. The third essential ingredient that the competent authority must record the reasons of satisfaction in writing for not holding the enquiry is clearly meted out. Therefore the dismissal of the appellant/petitioners was upheld as all the parameters laid down by the apex court for a valid/legal application of clause (b) to the second proviso under article 311(2) of the Constitution of India, were duly complied.

XIII BACKWARD CLASS COMMISSION ARTICLE 340

In *Ram Singh* v. *Union of India*,[52] a notification dated March 4, 2014 that included Jat Community in the Central List of Backward Classes for the States of Bihar, Gujarat, Haryana, Himachal Pradesh, Madhya Pradesh, NCT of Delhi, Bharatpur and Dholpur districts of Rajasthan, Uttar Pradesh and Uttarakhand was challenged before the Supreme Court of India. The notification was issued by the Union Cabinet after rejecting the opinion given by the National Commission for Backward Classes (NCBC) on the ground that it did not consider the ground realities.

The National Commission for Backward Classes (NCBC) was constituted in the light of article 340 of the Constitution of India by enacting the National Commission for Backward Classes Act, 1993. This specialised body was entrusted under the Act of 1993 with the task of addressing the complaints relating to non-inclusion or wrong inclusion of groups, classes and sections in the list of other backward classes from time to time.[53] The Act of 1993 did not provide with the provision for the Central Government to override the opinion of the National Commission for Backward Classes. The questions that arose in the present case was whether the opinion formed by the

52 (2015) 4 SCC 697.

53 *Indra Sawhney* v.*Union of India,* 1992 Supp (3) SCC 217, See s. 9 of the National Commission of Backward Classes Act, 1993.

National Commission for Backward Classes not to include the Jats in the Central List of backward classes was based on irrelevant and extraneous materials and facts, and whether the action of the Central Government in declining to follow the opinion of the commission was valid.

The Supreme Court reviewed the state-wise report of the NCBC which was based on the summary of the findings of the expert body of Indian Council for Social Science Research (ICSSR), [54] various reports of state backward class commissions and other relevant literature on the subject. The court concluded that the report of NCBC was strongly founded on concrete materials and relevant reports supported by good and acceptable reasons for forming such opinion. The advice of the commission not to include Jats in the central list of backward classes in the nine states cannot be said to be irrelevant and based on extraneous materials and facts. The Central Government cannot by-pass the opinion of the specialized statutory body (NCBC) and further, it had failed to show that there were strong compelling and overwhelming reasons to decline the opinion of the NCBC. Hence, the writ petitions were allowed and the said notification was set aside and quashed.

Reservations always become a contentious issue. Caste based reservations though technically not recognized under the constitution as the constitutional provisions expressly mentions 'class', in practice reservations are predominantly provided on the basis of caste. Article 15 (4) prescribes two conditions *i.e.*, social and educational backwardness whereas 16(4) adds another condition of not adequately represented. In the light of various Supreme Court judgments particularly after *M. Nagaraj's* case[55] providing reservation without quantifiable data and supporting evidence of social and educational backwardness would violate constitutional mandate. In *Indra Sawhney*,[56] the Supreme Court directed for appointment of a permanent body and any new class/group that is proposed to be included must be referred to by such body. Action must be taken on the basis of recommendation of such body and the advice/opinion given by such body should ordinarily be binding upon the government. Where, however, the government does not agree with its recommendation, it must record its reasons. It is crystal clear that providing reservations for any class need to be on the recommendation of NCBC.

54 The Summary of Findings contained a study of 8 specific reports such as Social Justice Committee Report, Uttar Pradesh (2001), Socio-Economic Status of Farming Communities in Northern India, Uttar Pradesh (2003), Caste, Land and Political Power in UP, Uttar Pradesh, Justice Gurnam Singh Commission Report, Haryana (1990), K.C. Gupta Report, Haryana (2013), Gummanmal Lodha J Commission Report, NCT of Delhi (1999), Dr. LipiMukhopadbyay Report, Delhi (2005), State Backward Classes Commission's Reports of State Governments of Rajasthan, Madhya Pradesh, Himachal Pradesh and Gujarat. It also included fifty one representations in favour of inclusion of Jats in the Central Lists and fifty eight representations against such inclusion received by the NCBC were also forwarded to the ICSSR.

55 *M. Nagraj* v. *Union of India* (2006) 8 SCC 212.

56 1992 Supp (3) SCC 217.

Going against its recommendations without compelling reasons is a political move by the government to pacify certain sections of the society. If such reservations are allowed, the caste based division would further perpetuate the stratification of society. It is heartening to note that NCBC recommended for a non-caste based identification of backward classes and no one would dispute about it.

XIV ARTICLE 342

Caste is predominantly a Hindu phenomenon. One can arrive at such a premise based on the challenges that are made to laws dealing with the question of membership of scheduled caste. The Constitution Scheduled Caste Order, 1950 and the lateral amendments to the said order specify that only Hindu, Buddhist and Sikh can be members of the Schedule Castes. Thus other religions like Christians and Muslims are not eligible to be declared as SCs. As a result conversion of a scheduled caste of Hindu, Sikh or Buddhist to any other religion operates as an expulsion from the caste and thereby convert ceases to be a member of SC.

This practice had resulted in cases challenging the constitutionality of the rule particularly in conferring the benefits of the reservations. Though on the peripheral it looks to be a legal and utmost a constitutional issue, a deeper insight into the problem reveals social and economic implications. One has to bear in mind that many of the conversions, particularly to Christianity is witnessed among the untouchables and low ranking castes. Does the conversion of people from these castes into Christianity eliminate their untouchability status? If not how a mere change of faith from one God to another God would disqualify these people from the membership of SCs so that to deny the benefit provided by the Constitution. Though issue of conversion and reconversion with regards to SC status was decided way back, this issue continuously crop up before the apex court year after year.

Any decision on the status of those converted to other religion or reconverted to Hindu religion cannot be decided purely on a legal front. One has to consider the truth that in spite of SCs converted to Christianity or to any other religions, their untouchable status remains and they still continue to suffer various social, educational and economic handicaps and taboos. The treatment to the Scheduled caste is same irrespective of the religion they belong. In that sense, caste becomes not a Hindu phenomenon but an Indian.[57] In this backdrop *K.P. Manu* v. *Chairman, Scrutiny*

57 In Christianity there were practices of separate places are marked out for churches and burial grounds. Inter-caste marriages are not acceptable, caste tags are still appended to the Christian names of high caste people.
See also, Mandal Commission report of the Backward Classes Commission in 1980, speaking about the Indian Christians in Kerala had expressed thus:
"…. Christians in Kerala are divided into various denominations on the basis of beliefs and rituals and into various ethnic groups on the basis of their caste background ….even after conversion, the lower caste converts were continued to be treated as Harijans by all sections of the society including the Syrian Christians, even though with conversion the former ceased to be Harijans and untouchables….. In the presence

Committee for Verification of Community Certificate,[58] raises an issue whether a person whose caste is recognised as SC, when his great grandfather was converted into Christianity, and his father continued to be a Christian, a reconversion by him to Hindu religion would qualify him to be a SC and there by continue to avail the benefits of reservation. The grandfather of the appellant belonged to Hindu Pulaya Community which is recognized as a SC. His son and grandson (father of the appellant) continued to be Christians. The appellant at the age of 24 converted himself to Hindu religion and changed his name to K.P. Manu. Based on the conversion he obtained a caste certificate from Akhila Bharata Ayyappa Seva Sangham. Eventually, the tehsildar who was authorized to issue the caste certificate had issued the necessary caste certificate and based on the caste certificate he joined government service using SC status. His appointment was challenged on the ground that the caste certificate was obtained by misrepresentation and a petition was filed before Scrutiny Committee for Verification of Community Certificate challenging the validity of the caste certificate. After conducting a thorough inquiry the scrutiny committee come to a conclusion that the appellant was erroneously issued a caste certificate in as much as he was not of Hindu origin and hence, could not have been conferred the benefit of the caste status.

The decision of the committee was influenced by two aspects. First, the appellant was born to Christian parents, whose grandparents had embraced Christianity and second, there is no material brought on record to show that the appellant after conversion has been following the traditions and customs of the community as he married to a Christian lady.

Based on the report, the state government took action by removing him from service and ordered for recovery of a sum of Rs.15 lakhs towards the salary paid to him. Both report and the removal order were challenged before the high court and the high court dismissed the petition holding that the appellant is not entitled to SC status. On appeal to the Supreme Court, it was observed that the controversy raises the following three issues

i. Whether on conversion and at what stage a person born to Christian parents can, after reconversion to the Hindu religion, be eligible to claim the benefit of his original caste;
ii. Whether after his eligibility is accepted and his original community on a collective basis takes him within its fold, can he still be denied the benefit; and
iii. That who should be the authority to opine that he has been following the traditions and customs of a particular caste or not.

of rich Syrian Christians, the Harijan Christians had to remove their head-dress while speaking with their Syrian Christian masters. They had to keep their mouth closed with a hand ..... It was found that the Syrian and Pulayamembers of the same Church conduct religious rituals separately in separate buildings ... Thus lower caste converts to a very egalitarian religion like Christianity, ever anxious to expand its membership, even after generations were not able to efface the effect of their caste background."

58 AIR 2015 SC 1402.

To answer the above, the court opined that three things are needed to be established by a person who claims to be a beneficiary of the caste certificate.

(i) There must be absolutely clear cut proof that he belongs to the caste that has been recognized by the Constitution (Scheduled Castes) Order, 1950;

(ii) There has been reconversion to the original religion to which the parents and earlier generations had belonged; and

(iii) There has to be evidence establishing the acceptance by the community.

All three conditions must be satisfied and even if one is not substantiated, the recognition would not be possible. In the present case, as far as the first aspect is concerned there is no dispute. If conversion of a Hindu SC into any other religion disqualifies the person to be SC, a person who is born to Christian parents who had converted to Christianity from the SC Hindu can avail the benefit of the caste certificate after his embracing Hinduism subject to other qualifications. The court finds no logic in denying the caste certificate to those who reconvert to Hindu religion. With regards to second aspect as far of community acceptance is concerned, he was converted to Hindu religion by the Sangham which is recognised as one of the agencies by the Government of Kerala as a competent organisation to issue the community certificate. Hence there is no doubt that the appellant had converted himself and thereafter was accepted by the community.

Further the Government by a Circular,[59] made clear that the religious status of parents will not affect the caste status of neo-converts provided they become major. Consequently the caste of the appellant would automatically revive once he converts to Hinduism. The third issue regarding who would or should be the authority, the court categorically said that it is the community which has the final say as far as acceptance is concerned, for it accepts the person, on reconversion, and takes him within its fold. The contention that he was married to a Christian and hence did not intend to be a Hindu, found no favour with the court. Based on the above reasons the appeal was allowed and the judgment and order of the high court, findings of the scrutiny committee and the orders passed by the state government and the second respondent were set aside. The court directed the respondents to reinstate the appellant in service forthwith with all the benefits relating to seniority and his caste, and shall also be paid back wages upto75%.

XV DISPUTES ARISING OUT OF TREATIES AND AGREEMENTS - ARTICLE 363

In *State of Madhya Pradesh* v. *Maharani Usha devi*,[60] an interesting question was posed to the Supreme Court in an appeal against the judgment of High Court of Madhya Pradesh regarding the maintainability of a suit for declaration of title to certain properties covered under a covenant in view of bar imposed on the jurisdiction of

59 No. 18421/E2/87SCSTDD dated on Dec 15, 1987.

60 AIR 2015 SCW 4119.

courts under article 363[61] of the Constitution of India. The suit in the present case was filed by respondent/plaintiff, Maharani Usha devi - the sole heir of Maharaja Yashwanth Rao Holkar, the erstwhile Ruler of Holkar State to seek declaration of title in respect of the properties of Bijasan, Ashapura, Bercha, Mohna and Gajihata. Maharaja Holkar acceded to merge with the Dominion of India through a Covenant executed on 16 June 1948. As per article XII of the covenant, the Maharaja of Holkar was allowed to submit a list of properties over which he wanted to exercise exclusive ownership rights. The list of such personal properties of the Maharaja of Holkar was submitted to the Dominion of India under the titles, Properties inside the state, properties outside the state, miscellaneous properties and certain properties under the administrative control of the household department of the Holkar state mentioned at clause 14. The concerned suit properties of Bijasan, Ashapura, Bercha, Mohna and Gajihata were not expressly mentioned in the list. However, the plaintiff claimed that the properties belonged to clause 14 list of properties. She also relied on the taxes paid by them pertaining to these properties and the correspondences dated May 7, 1948 and January 30, 1956 whereby these properties were re-transferred to the household department.

The Supreme Court held that to determine the question as to ownership of concerned suit properties, the court has to review the contents of covenant dated 16 June 1948 executed between Maharaja Yashwanth Rao Holkar and the Dominion of India. However, article 363 of the Constitution of India bars such questions to be decided by any courts in India. Therefore, the appeal of the State of Madhya Pradesh was allowed and suit was dismissed.

XVI ARTICLE 371-D

In *M. Surender Reddy* v. *Government of Andhra Pradesh*,[62] the President of India issued the Andhra Pradesh Public Employment (Organization of Local Cadres and Regulation of Direct Recruitment) Order, 1975 dated 20th October, 1975 under article 371-D (1) and (2) of the Constitution of India. The Presidential order empowered the state government to organise posts in civil services and the civil posts under the state government and to provide reservations in direct recruitments. In accordance with the power entrusted by the Presidential Order, the Government of Andhra Pradesh issued G.O.P. No.729 on November 1, 1975, whereby local candidates were allotted 70% reservation in non-gazetted category posts excluding the lower division clerk or other equivalent posts.

The G.O.P. No.763 dated November15, 1975 laid down the procedure for recruitment and provided for a combined merit list for local and non-local candidates for the posts. However, the State Government later issued G.O.MS. no.124 dated March 17, 2002 to modify G.O.P. No.763 dated November 15, 1975 in order to provide for two separate merit lists for local and non-local candidates. The Andhra Pradesh

61 Constitution of India, 1950, art. 363: Bar to interference by courts in disputes arising out of certain treaties, agreements, etc.

62 (2015) 8 SCC 410.

Public Service Commission advertised for recruitments to executive and non-executive posts of 27 categories under group-II services in 1999. A total of 104 candidates were selected for Executive posts in December 2000. In the Meanwhile, the high court ordered for additional executive posts to be advertised and Andhra Pradesh Public Service Commission prepared a combined list of selected 973 candidates including 104 candidates who were already selected for executive posts. The administrative tribunal on consideration of the issue of combined merit list, directed the state government to recast the separate merit list based on G.O.Ms. no.124 on March 7, 2002. However, on appeal high court dismissed the order of tribunal and directed to exclude already appointed assistant sections officers for the executive posts. On appeal, the question before the Supreme Court was that whether the G.O.Ms. no.124 dated March 17, 2002 has retrospective operation and whether it can be applied to recruitment procedure initiated through advertisement of 1999. The Supreme Court held that state government cannot retrospectively apply the G.O.Ms. no.124 dated March 7, 2002 to vitiate the selection process that had already begun in 1999.

XVII THE CONSTITUTION (ONE HUNDREDTH AMENDMENT) ACT, 2015

India shares approximately 4096.7 km. boundary with Bangladesh covering West Bengal, Assam, Tripura, Meghalaya and Mizoram. There are 111 Indian enclaves,[63] inside Bangladesh and 51 Bangladeshi ones inside India which created several issues regarding access, illegal migration and citizenship issues.[64] To settle these issues, the India-Bangladesh Agreement was signed in 1974, and the agreement was ratified by the Bangladesh Government in 1974. Though cabinet approved the agreement in the same year, India did not ratify the same as it involved transfer of territory which required a Constitutional Amendment. Hence, The Constitution (119 Amendment Bill) 2013 has been introduced to ratify the Agreement. The Bill was passed in the year 2015 and became The Constitution (One Hundredth Amendment) Act 2015. The Act received the assent of President on May 28, 2015. The Act amends the First Schedule of the Constitution to give effect to an agreement entered into by India and Bangladesh. The first schedule of the Constitution defines the area of each state and union territory which together constitute India.

This Act allows to redraw the boundaries between India and Bangladesh by exchanges several enclaves in the states of Assam, West Bengal, Meghalaya, and Tripura. The Amendment puts an end to the unresolved issues that had arisen due to hasty partition of the subcontinent. It enables the inhabitants of these enclaves to enjoy full rights as citizens of either country.

63 Enclave means territory belonging to one country that is entirely surrounded by the other country.

64 Report of Standing Committee on External Affairs, 2014 – 15, *available at*: http://www.prsindia.org/uploads/ media/ Constitution%20119/SCR-%20119th%20(A)%20Bill.pdf (last visited on May 25, 2016).

XVIII CONCLUSION

Constitutional morality is an indispensible condition for existence of a government. However, fostering allegiance and enforcing obedience to the constitutional principles of governance is a task that is chiefly left to the judiciary. The expanding horizons of judicial review resulted in emancipation of judicial hegemony in India. Overturning the decisions of elected representatives of legislature and executive by the constitutional courts poses complex issues. Judges are neither elected nor directly responsible to the people. Yet constitutional courts enjoy special status and command the respect of the people. Reasons could be plenty. Courts in India enjoy support of political power directly from people independent of constitutional power. To a larger extent conferring such political power to the courts particular to the Supreme Court presupposes the confidence of people in the judiciary.

The role of the courts broadened due to constitutionalization of private law. As the role of the court is expanding, the issue of its independence took center stage and dominated the national debate due to Constitution (Ninety-Ninth Amendment) Act, 2014 and the NJAC Act, 2014 (NJAC). As expected both of these were duly challenged before the Supreme Court. *Supreme Courts Advocates Association* case raised the issue of propriety of judges appointing themselves. The judgment raises more issues than the ones settled.

The judgment puts a considerable strain on judicial interpretation of written text of the Constitution. The conclusions drawn by the court endorsing judicial supremacy in appointment of judges and attributing the same to the Constitution framers and the constitutional debates including the written text of the Constitution casts serious doubt about judicial interpretation when in fact the written words convey the meaning explicitly in the other way. The effect of the judgment is that the dependence on the executive is merely transferred to judiciary. If executive and legislature could misuse the power so could the Judiciary; hence in the absence of a well-established independent system, appointments of judges to the constitutional courts by the judiciary would also have same pitfalls.

Common Cause case emphasizes the need to put a check on public expenditure by the governments and highlights that judicial intervention is the last hope for the public when state apathy run riot. Another classic case of flouting of rules of procedure and abuse of power is *Delhi International Airport Ltd.,* Similarly, *Bajrang Bahadur Singh* case deals with disqualifications or members of legislative assembly. The purpose of such disqualifications is to maintain the integrity of the legislature and to restrict undesirable persons from holding the membership. Constitution created a mechanism to deal with disqualifications of elected members. However, there is a possibility of overlapping of time. Legislature should have anticipated these issues and made suitable laws to deal with such situations. In the absence of such initiation the task was left to the Supreme Court to decide the timeframe for challenging the disqualification order in the court of law. Such lapses reinforce the belief that if not for the Judiciary the rule of law in this country would be in shambles.

The idea of local self government is to promote grass root democracy. Democracy being majority rule *Rajbala* case amply explains how such idea is under attack. The

paradoxical disqualification by the Haryana Government exemplifies the dichotomy between the qualification of members to local self-government on one hand and MLAs and MPs on the other. It is high time to have uniformity in qualifications and disqualifications. *K.P Manu* raises the recurring issue of impact of conversion on caste and thereby eligibility of reservations. Court rightly recognized that caste is no more a Hindu phenomenon but an Indian one. Therefore a mere conversion of Hindu SC member into another religion would not automatically improve the status of the converted. There is ample evidence to show that conversion by persons of the lower castes to another religion faces same amount of discrimination even after conversion. Right to follow any faith being a fundamental right, we need to relook at the issue of losing SC status due to conversion.

Expanding the role of Supreme Court from being the final interpreter of Constitution, to a rule-making body to compensate for the failure of the legislature and executive, will have far reaching consequences. Many of the cases under this year's survey though justify such role of the court; to say that the court majestically carried such an obligation with few blemishes would have the effect of Supreme Court becoming super court. Such a situation is neither good for democracy nor for a constitutional jurisprudence based on rule of law.