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CONSTITUTIONAL LAW – II

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I INTRODUCTION

CONSTITUTIONAL VALUES and principles govern all individuals. Additionally, some countries like India have specific duties that their citizens must observe. These duties could be classified as verticle and horizontal. Vertical duties apply to individuals towards their nation and its organs. In contrast, horizontal duties refer to the relationship between individuals.[1] The values enshrined in the Constitution may sometimes compete with prevailing social values. Therefore, the purpose of verticle duties is to promote the basic values of the Constitution over the social values.

On the other hand, horizontal values aim to internalise constitutional values into the private lives of individuals. The importance of horizontal duties is not to be undermined, as the internalisation of horizontal duties would ultimately promote vertical duties. Additionally, the rights recognised under the Constitution and the powers conferred by the Constitution impliedly impose a duty. For example, a fundamental right imposes a duty on the State not to violate such a right, and the power conferred on the Legislature imposes a corresponding duty not to abuse the same. In that sense, the Constitution either expressly or impliedly imposes an obligation on functionaries it creates to abide by its values. The success of democracy depends on how well these functionaries perform their constitutional duties. The recourse for violation of such obligation is vested with the Judiciary. This year's annual survey will reflect on how constitutional functionaries exercise such duties and the role played by the Judiciary in keeping them within the boundaries of constitutional norms.

II COLLECTIVE RESPONSIBILITY

It is well said that the scars a tongue leaves will never heal. Freedom of speech is a fundamental right under the Constitution and is a systemic right. Recognition of such rights is absolutely necessary for the survival of a democracy. However, such a right does not give, at least in principle, the unfettered right to

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1 Alona Hagay Frey, Constitutional Human Duties, Georgia Vol. 51 *Journal of International and Comparative Law*, 327 (2023).

derogate an individual or a group.In the case of *Kaushal Kishor* v. *State of U.P.,*[2] one of the questions before the court was whether the Council of Ministers are vicariously liable for derogatory statements made by the Minister in view of the principle of collective responsibility.

The factual matrix of the case is that the then Minister for Urban Development of the Government in the Uttar Pradesh termed an incident of sexual assault against a woman and a minor girl a political controversy. In another instance, the then Minister of Electricity in the State of Kerala issued certain statements which were highly derogatory to women. The court, while addressing the aforementioned question, observed that as per article 75(3) and 164(2), it is the Council of Ministers who are collectively responsible to the House of the People or the Legislative Assembly, and such responsibility is towards the actions of the Council of Ministers and towards every individual statement made.

The court cited the case of *State of Karnataka* v. *Union of India,*[3] wherein it was observed by Beg, C.J. as follows:

> 46. The object of collective responsibility is to make the whole body of persons holding Ministerial office collectively, or, if one may so put it, "vicariously" responsible for such acts of the others as are referable to their collective volition so that, even if an individual may not be personally responsible for it, yet, he will be deemed to share the responsibility with those who may have actually committed some wrong…

The court placed reliance on the case of *R.K. Jain* v. *Union of India,*[4] and cited the relevant extracts as follows:

> 30. Collective responsibility under Article 75(3) of the Constitution inheres maintenance of confidentiality as enjoined in oaths of office and of secrecy set forth in Schedule III of the Constitution that the Minister will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under his/her consideration or shall become known to him/her as Minister except as may be required for the "due discharge of his/her duty as Minister". The base and basic postulate of its significance is unexceptionable. But the need for and effect of confidentiality has to be nurtured not merely from political imperatives of collective responsibility envisaged by Article 75(3) but also from its pragmatism.

The court laid down the following points explaining the concept of collective responsibility.[5]

i. that the concept of collective responsibility is essentially a political concept;

2 (2023) 4 SCC 1.

3 (1977) 4 SCC 608.

4 (1993) 4 SCC 119.

5 See, *State (NCT of Delhi)* v. *Union of India* 111 (2018) 8 SCC 501.

ii. that the collective responsibility is thatof the Council of Ministers; and

iii. that such collective responsibility is to the House is to the People/ Legislative Assembly of the State. Generally, such responsibility correlates to

(i) the decisions taken; and

(ii) the acts of omission and commission done.

Therefore, the concept of collective responsibility cannot be extended to any and every statement orally made by a Minister outside the House of the People/Legislative Assembly. The concept of collective responsibility denotes that every individual Minister is responsible for the decision collectively taken by the Council of Ministers but not *vice versa*. By a 4:1 majority, the court held that the Council of Ministers are not vicariously liable in view of the principle of Collective Responsibility even if a statement made by a Minister can be traced to the affairs of the State or protecting the government.

The next question is the statements of Ministers violating the fundamental rights, thereby giving rise to a constitutional tort. The court observes that Ministers make statements for various purposes and in various places. The court opines that all such statements need not necessarily give rise to an action in tort or in constitutional tort. The court gives an example that if a minister:

> "makes a statement that women are unfit to be employed in a particular avocation" At most, the court says it can be viewed as the insensitivity of the Minister and his lack of understanding the constitutional values or having low constitutional morality and that cannot be a ground for constitutional tort. To drive its point, the court says holding any opinion that is against the constitutional value cannot be penalised. The action could be taken only when the action of the Minister actually results in the violation of the constitutional principles.

Regarding constitutional tort, the court held that after *Rudalsha*, it is a well-established principle that the state is liable for the torts committed by its servants, including the ministers, only when harm or loss is caused due to their actions. But court pointed out that "A mere statement made by a Minister, inconsistent with the rights of a citizen under Part III of the Constitution, may notconstitute a violation of the constitutional rights and become actionable as Constitutional tort. But if as a consequence of such a statement, any act of omission or commission is done by the officers resulting in harm or loss to a person/citizen, then the same may be actionable as a constitutional tort."

Though the decision sounds reasonable, one cannot ignore the fact that the comments made in the present case are disparaging and vitriolic by the political authority and have the potential to cause intolerance; hence, there is a need to take decisive action on such behaviours. The dissenting opinion of Justice Nagrathna is worth considering in this aspect.

Nagarathna, J., gave the dissenting view in this case and opined that the Council of Ministers are vicariously liable for invoking the principle of collective responsibility if any statement made by a Minister can be traced to the affairs of the State or protecting the government provided the government is consistent with the same view. Where the government is not consistent with such a statement by a minister, then the minister shall be personally liable for the same.

She advocates for developing a well-defined legal framework to identify the speeches that constitute constitutional torts. However, she puts a caveat in saying that not every instance where a public functionary's statement causes harm or loss to an individual should automatically be treated as a constitutional tort. By bringing the distinction between private and public functions, she says that public functionaries may be held personally liable if their statements contradict the government's official stance. The vicarious liability of the government would arise only if their statements align with or are endorsed by the government.

In her judgement, she relies on *Amish Devgan,*[6] who identifies three distinct elements that legislatures and courts can use to define hate speech.

i. The Content Element which involves the use of words or phrases that are offensive to a particular community or objectively offensive to the society

ii. The Intent-based Element focuses on the intent of the speaker to promote hatred or resentment against a group/class which lacks any legitimate message.

iii. The Harm or Impact-based Element refers to the consequences of the speech which either cause harm or loss of self-esteem or promotes/advocates the subordination.

She is critical of the need to balance the individual right to speech and the right to life and dignity under article 21. In the present case, there is no need for such a balance as derogatory speeches do not necessarily need to be protected, as they do not become part of free speech when such speech derogates human dignity. Such unguided, derogatory, and vitriolic speech has no value for society and is not an essential part of the ideas that are required for protection under the Constitution.

Even the public and private function tests to determine liability would fall flat in such cases, as we have already witnessed the blurring of the line between the realms of public law and private law. One cannot decide whether the expression of a constitutional functionary is in the private or public realm, and both influence each other. Therefore, Nagaratna J., opines that the Parliament should bring legislation to control the public and private functionaries from making such speeches. Further, she also expects the political parties to regulate and control the derogatory speeches by their members through a self-made code of conduct. However, one cannot forget that these speeches are mostly made for political gains, and it would be futile to expect the political parties to bell these when it is

6 *Amish Devgan* v. *Union of India* (2021) 1 SCC 1.

gaining or expected to gain political mileage. The dangers of permitting such speeches are well articulated by Lau Tzu, a celebrated Chinese philosopher and writer, as quoted by Justice Nagarathna in her judgment as follows.

"Watch your thoughts; they become words.
Watch your words; they become actions.
Watch your actions; they become habit.
Watch your habits; they become character.
Watch your character; it becomes your destiny."

III ARTICLE 136

In *Ravasaheb @ Ravasahebgouda* v. *State of Karnataka*,[7] a pertinent question regarding the power of the appellate courts in the appreciation of evidence is raised. In the present case, eight people were sentenced to life imprisonment based on the testimony of a solitary witness by the trial court. The high court upheld the same in an appeal. A further appeal was preferred before the Supreme Court, asking to re appreciate the evidence. The question is whether the court in an appeal interferes with the concurrent findings of the two courts and re-fabricates the facts and evidence. Explaining the power of the appellate courts, the Supreme Court held that appreciation of evidence in an acquittal or conviction continues in all stages of the case. However, while appreciating the same, the appellate court must give due importance to the trial court's findings and judgement. Relying on *Gurudutt* and *Geeta Devi*[8] the court held that it is mandatory that the high court re-appreciate the evidence on the record being the first appellate court. Any deviation of the same could be reasonable grounds to remand the matter for reconsideration. While explaining the power of the Supreme Court under article 136, the court finds that the jurisdiction under this article is on a different footing. Unless there are any special circumstances present or the presence of gross errors committed by the high court, the Supreme Court cannot interfere with the concurrent findings of the facts of the court below. The self-imposed restriction on exercising jurisdiction under article 136 is that no appreciation of evidence is permissible unless there is a manifestation of gross error.[9]

Satish Chandra Yadav v. *Union of India*[10] is another case where the Supreme Court explained the scope of its jurisdiction under article 136. While explaining the scope, the court pointed out that the jurisdiction is divided into two stages. The first one is at the admission stage, where the question is whether to admit the appeal. The second stage starts when the leave is granted and converted into an appeal.

7 (2023) 5 SCC 391.

8 *Gurudutt Pathak* v. *State of U.P*. [(2021) 6 SCC 116] the judgment in *Geeta Devi* v. *State of U.P*. (2022 SCC OnLine 57.

9 Supreme Court relied on *Sharad Birdhichand Sarda* v. *State of Maharashtra* (1984) 4 SCC 116 and *Kalamani Tex* v. *P. Balasubramanian* (2021) 5 SCC 283.

10 (2023) 7 SCC 536.

In the first stage, the court examines whether there are reasonable grounds to grant leave to the petitioner. At this stage, the court is merely exercising its discretionary jurisdiction. The petitioner remains at the entry gate and is not yet an appellant; the entry into the appellate process is subject to the court's decision. If the petition for leave is dismissed, it signifies the court's opinion that the case is not fit for invoking its jurisdiction under article 136.

If leave is granted, the second stage begins, allowing the petitioner to enter the appellate jurisdiction of the Supreme Court. However, in appropriate cases, the court retains the power to dismiss the appeal without issuing notice to the respondent. During this stage, the order, decree, or judgment for which special leave was granted remains operative unless nullified or stayed by the Supreme Court.

While explaining the two stages, the court reiterated that it would exercise its overriding powers under Article 136 of the Constitution only in exceptional and special circumstances where substantial and grave injustice has been done. The wide discretionary power vested in the court under article 136 is to be used sparingly and only in extraordinary cases.

Javed Shaukat Ali Qureshi v. *State of Gujarat*[11]is a case relating to a murder; a total of 13 accused were prosecuted. The trial court found guilty of seven accused. In an appeal, the high court, while upholding the conviction, reduced the punishment. Accused 1, 5 13 preferred an appeal to the Supreme Court. The court acquitted them. Accused 3 and 4 did not prefer an appeal. The appeal of the accused 2 was summarily dismissed. The *Amicus Curie* raised the issue before the Supreme Court that when the Supreme Court, in the appeal, acquitted the accused 1, 5, and thirteen on the ground the witness testimony was not reliable and the accused 2, 1 and 5, who were convicted based on the same testimony shall get the same benefit. Relying on *Pawan Kumar* v. *State of Haryana*[12] the court held that article 136 could be invoked in favour of the party, even *suo moto*, when the court is satisfied that the compelling grounds for its exercise exist. The court observed that when other accused were acquitted on the grounds that the testimony of witnesses was unreliable and deserved to be discarded, the same relief shall be extended to other accused. If it is not extended, it would amount to a violation of fundamental rights under article 21. Therefore, the present circumstances warrant exercising the jurisdiction under article 136 *suo moto*.

IV POWER OF GOVERNOR

A.G. Perarivalan v. *State, Through Superintendent of Police CBI/SIT/ MMDA, Chennai, Tamil Nadu*,[13] raises an important question regarding the power of the Governor to refer the matter to the President. The appellant is accused of the assassination of former Prime Minister of India Rajeev Gandhi, former Prime Minister of India. He was sentenced to death, and the same was upheld by the

11 (2023) 9 SCC 164.

12 (2003) 11 SCC 241.

13 (2023) 8 SCC 257.

Supreme Court. His review petition to the Supreme Court and the mercy petition to the President were dismissed. Thereafter, he approached the Governor of Tamil Nadu for mercy, and when the same was dismissed, he approached the High Court of Tamil Nadu. On the order of the high court, the mercy petition was reconsidered by the Governor, and the same was rejected.

Once again, the appellant filed a mercy petition before the President of India under Article 72 of the Constitution. Upon rejecting the same, he challenged the President's decision before the High Court of Tamil Nadu. The high court transferred the petition to the Supreme Court. After hearing the petition, the Supreme Court commuted the death penalty to imprisonment for life.

After the completion of the sentence of 23 years, the Tamil Nadu Government considered his case for remission under Section 435 of the Criminal Procedure Code, 1973, and requested the Central Government's opinion as (the case had been investigated by the Central Bureau of Investigation (CBI). The Union of India immediately filed a criminal miscellaneous petition requesting the court to instruct the State not to release the appellant. The court passed a Status quo order, and the review petition was dismissed after hearing the case.

The Union of India filed a writ petition before the Supreme Court to quash the State of Tamil Nadu's communication. Considering the constitutional issue involved in the case, the case was referred to a constitutional bench after formulating seven questions for consideration. In *Union of India* v. *Sriharan,*[14] the Supreme Court settled the issue of the appropriate government to exercise the power of remission under Cr.PC.

Meanwhile, the appellant filed a petition for remission of his sentence under Article 161 of the Constitution before the Governor. As a result, the Supreme Court disposed of the writ petition filed by the Central Government questioning the decision of the State to consider remission as the appellant approached the Governor under Article 161 of the Constitution. The Tamil Nadu Cabinet passed a resolution recommending that the governor release the appellant, which was sent to the governor for his consideration.

During the pendency of these appeals, this court was informed that no decision had been taken by the Governor on the resolution passed by the Tamil Nadu Cabinet on August 9, 2018, recommending the release of the Appellant. On February 11, 2020, this court directed the Additional Advocate General for the State of Tamil Nadu to get instructions on the status of the recommendation of the Council of Ministers to the Governor. The appellant filed a criminal miscellaneous petition before the TADA Court, Chennai, praying for effective monitoring of the pending investigation of the assassination. The TADA Court dismissed the said petition. When he approached the high court, the high court advised him to approach the Supreme Court.

Hence, the appellant approached the Supreme Court. During the hearing, the question of mercy petition before the Governor was raised, and the court was

14 1 (2016) 7 SCC 1.

informed that the Governor had not taken a decision regarding the recommendation of the cabinet for remission as the final report of the Multi-Disciplinary Monitoring Agency (for short, 'MDMA') was awaited. In an affidavit, the CBI informed the court that they had not received any request from the Governor for a report, and they further contended that the Governor can make the decision on his own and that there is no need for such a report.

At this point, the court was assured that the Governor would make a decision; however, instead of taking the decision, he referred the matter to the President of India. Taking into consideration the inordinate delay in deciding the matter, the Supreme Court released the appellant on bail as the appellant had already spent 31 years in prison. The fundamental issue raised in this case is that the recommendation made by the State Cabinet to grant remission to the appellant should have been decided by the Governor and does the Governor have the power to refer the recommendation of the State Cabinet to the President of India?

It was argued that the advice the State Cabinet gave was binding on the Governor. The governor has no constitutional power to exercise independent discretion, and at the most, the governor could have requested the state cabinet to reconsider its decision. Hence, the Governor has no power to refer the recommendations to the president

After careful examination of the constitutional principles and the precedents, the court held that Article 163 of the Constitution mandates the Council of Ministers, with the Chief Minister at the head, to advise the Governor in the exercise of his functions. The advice given by the state cabinet is binding on the Governor. The court categorically held that there is no provision of the Constitution that confers such power of reference to the Governor. Therefore, the court held that the Governor has no power to recommend the advice of the State Cabinet to the President of India. In the absence of any constitutional power, sending the recommendation to the President of India is contrary to the constitutional scheme of exercising the power of the Governor. Further, it was observed that the Governor did not act upon the advice given by the Cabinet almost for two and a half years. The Governor only forwarded the recommendation to the President when the court enquired about it.

The court observed that the reliance of the respondent on the judgment of the Supreme Court in *M.P. Special Police Establishment* v. *State of M.P*[15] is misplaced as there is evidence to show that the Cabinet had recommended the remission based on any irrelevant considerations or relied on any extraneous factors to reach such a conclusion. Therefore, the precedent set by the Supreme Court in *M.P. Special Police Establishment* is not applicable to the present case. Further, the court opined that the governor made the decision in the M.P. Special

15 2 (2004) 8 SCC 788. (in this case the court held that the Governor can act on his own discretion the bias of the Council of Ministers became apparent and / or the decision of the Council of Ministers is shown to be irrational and based on non-consideration of relevant factors.

Police Establishment. In the present case, he merely forwarded the recommendation to the President instead of taking the decision. The next contention is that the power to grant pardon or remission when a sentence was imposed under IPC is the exclusive domain of the President and did not find favour with the court. In the *Sriharan* case the Supreme Court dealt with the following question :

i. Whether Section 432(7) of the Code clearly gives primacy to the Executive Power of the Union and excludes the Executive Power of the State where the power of the Union is coextensive?

ii. Whether the Union or the State has primacy over the subject-matter enlisted in List III of the Seventh Schedule to the Constitution of India for exercise of power of remission?

iii. Whether there can be two appropriate Governments in a given case under Section 432(7) of the Code? Answer

In answering the above question, the Supreme Court laid down a test to determine whether the executive power of the Union shall be decided on whether the executive power was expressly conferred on the Union either by the Constitution or under the law made by the Parliament. With regard to Section 302 of the IPC, neither the Constitution nor the Parliament expressly conferred executive power to the Union. Therefore, the executive power of the state is extended to section 302, whether the subject matter of section 302 is covered by an Entry in List II or an Entry in List III of the Seventh Schedule.

Considering the fact that the appellant was 19 years of age at the time of arrest and he was incarcerated for 32 years, out of which he has spent 16 years on death row and 29 years in solitary confinement, there are no complaints against his behaviour, he was released on two times on parole, deteriorating health conditions and he obtained postgraduate degree during the incarceration the court granted the remission by exercising its power under article 142.

The court summarised the position of the Governor in the following terms:

(i) The law laid down by a catena of judgments of this Court is well-settled that the advice of the State Cabinet is binding on the Governor in the exercise of his powers under Article 161 of the Constitution.

(ii) Non-exercise of the power under Article 161 or inexplicable delay in exercise of such power not attributable to the prisoner is subject to judicial review by this Court, especially when the State Cabinet has taken a decision to release the prisoner and made recommendations to the Governor to this effect.

(iii) The reference of the recommendation of the Tamil Nadu Cabinet by the Governor to the President of India two and a half years after such recommendation had been made is without any constitutional backing and is inimical to the scheme of our Constitution, whereby "the Governor is but a shorthand expression for the State Government" as observed by this Court.

(iv) The understanding sought to be attributed to the judgment of this Court in Sriharan (supra) with respect to the Union Government having the power to

remit / commute sentences imposed under Section 302, IPC is incorrect, as no express executive power has been conferred on the Centre either under the Constitution or law made by the Parliament in relation to section 302. In the absence of such specific conferment, the executive power of the State extends with respect to section 302, assuming that the subject matter of section 302 is covered by Entry 1 of List III.

V PUBLICATION OF COLLEGIUM RESOLUTION IN THE PUBLIC DOMAIN

In *Anjali Bhardwaj* v. *CPIO, Supreme Court of India (RTI Cell)*,[16] the petitioner filed an application under the RTI Act seeking a copy of the decisions taken at the meeting of the Collegium of the Supreme Court held on December 12, 2018. The Public information Officer (PIO) refused to supply the information, and the first appellate authority upheld the same on the ground that there was no consensus among the members, which culminated in a final resolution. The same was held in the second appeal and also by the high court. The petitioners approached the Supreme Court, contending that an article was published in Bar and Bench, stating that certain decisions were taken in the meeting, and the same was not uploaded on the website of the Supreme Court. Further, in the press, one of the members of the Collegium stated that he was disappointed that the decision taken during the meeting on December 12, 2018 was not uploaded to the website as per the Resolution of the Supreme Court dated October 3, 2017, which mandates such upload. The petitioner contends that even though no final decision was made, certain decisions were made; hence, a copy of those decisions should have been given to the petitioner under the RTI Act.

The court observed that it is possible that few decisions might have been taken during the discussion of the collegium meeting; however, unless and until a final decision was taken after due consultation and the same was reduced in writing as a resolution, no such oral discussions and decisions can be considered as the final decision of the collegium. A tentative decision taken during the discussion cannot be equated with the final decision drawn. Further, the resolution dated January 10, 2019 expressly mentioned that though some decisions were taken, the consultations were not completed, and as a result, the meeting was adjourned. There is no final decision, and the same need not be furnished under the RTI Act. Only a final decision signed by the member of the collegium needs to be uploaded to the Supreme Court website.

VI ARTICLE 217

What is the power of the Supreme Court in reviewing the appointments of Judges of the High Court under Article 217? Can the court issue a writ of *certiorari* against the collegium? These are the questions raised in *Anna Mathews* v. *Supreme Court of India*.[17] Article 271 (1) prescribes the procedure of appointment, while (2) deals with the qualification of a judge of the high court. In *Mahesh Chandra*

16 (2023) 4 SCC 784.

17 (2023) 5 SCC 661.

Gupta v. *Union of India*,[18] the court pointed out that the appointment of judges is an executive function of the President. Explaining the process of the appointment, the court held that whether a person is fit to be appointed as a judge is different from whether such a candidate is eligible to be a judge. The procedure prescribed under article 217(1) is designed to verify the fitness of a person by considering qualities such as character, integrity, competence, and knowledge. Identifying the difference between eligibility and suitability, the court held that judicial review is restricted only to test eligibility but not suitability. This was followed in the subsequent case of *M. Manohar Reddy* v. *Union of India*,[19] which held that the consultative process of eligibility identification could be judicially scrutinised but not the suitability of the candidate. Therefore, it is a settled principle that judicial review lies on whether a candidate is eligible to be appointed as a judge, but it does not extend to the consultation process where the suitability of the candidate is determined. In the landmark judgment on judicial appointments, *Supreme Court Advocates-on-Record Association* v. *Union of India*,[20] the court categorically held that judicial review could be extended to lack of effective consultation but not on the content of the consultation.

The court explained the consultation process that the Collegium of the high court recommends the candidate for elevation, and the Supreme Court receives input from the intelligence agencies that conduct a thorough background check. Further, the comments from the government were also considered by the collegium. In addition, the opinions and comments of the other judges of the Supreme Court who are familiar with the affairs of the high court concerned are called for in writing and placed before the Collegium. Only after considering all the information does the collegium decide. One of the petitioner's contentions is that candidates with political backgrounds were elevated as judges. Accepting this contention, the court opined that though political affiliations are a relevant consideration in deciding the fitness of the candidate, it is not a bar to an appointment when such candidate is otherwise a suitable candidate. Therefore, it was held that a writ of certiorari to quash the recommendation or mandamus against the collegium to reconsider its decision cannot be entertained. If such a writ is issued under the power of judicial review, it will amount to substitute the decision of the collegium with the personal opinions of the individual judges of the Bench on the suitability of the candidate for the post of the judge. Accordingly, the writ petition was dismissed.

Article 226

The power of the high court under article 226 is much broader than the Supreme Court under article 32. However, the jurisdiction under article 226 needs to be exercised judiciously. In *Anant Thanur Karmuse* v. *The State of*

18 (2009) 8 SCC 273.
19 (2013) 3 SCC 99.
20 (1993) 4 SCC 441.

Maharashtra,[21] the Supreme Court was asked to review the power of the high court. The appellant in this case shared on his Facebook account a picture of Jitendra Awhad, the then-sitting Cabinet Minister of the State of Maharashtra, and in his post, he criticised the act of the said Minister, ridiculing the Prime Minister of India. Later, he alleged that he was taken by police to the house of the Minister and was beaten at the behest of the Minister. It was alleged that he was threatened by the Minister to remove the post. The appellant filed an FIR against the Minister and his men. However, the police refused to name the Minister and his men. Fearing that the investigation may not be conducted in a fair manner, the appellant approached the high court with a writ requesting the court to transfer the investigation to either CBI or any other agency.

During the hearing of the writ petition, the high court passed several interim orders directing the investigating agency to conduct a proper investigation. Only after the high court intervention, after two years, was the Minister's name added as accused, and charges were framed against him by the trial court. However, the petitioner again approached the high court contending that in spite of all these measures, the police framed the charges against the accused on lesser punishable offences, requested for transfer of the case to CBI, and asked for a fresh investigation. The high court dismissed the case on the ground that once the chargesheet is filed and charges have been framed by the trial court, no further investigation or reinvestigation can be ordered as the trial has already begun. The appellant appealed to the Supreme Court, praying that the court transfer the investigation to CBI and further/reinvestigate his FIR.

The question that was raised before the court is whether, in the given facts and circumstances of the case, the high court was justified in denying the request for transferring the investigation to the CBI and refusing to order further investigation, re-investigation, or a de novo investigation.

In *Himanshu Kumar*,[22] the Supreme Court held that the investigation may only be transferred to the CBI in "rare and exceptional cases." The court observed in this case that to do complete justice when the cases involve high-profile officials in an alleged crime; the investigation can be transferred to the CBI if the circumstances justify such transfer. Further, the court pointed out that in *State of West Bengal* v. *Committee for Protection of Democratic Rights, West Bengal*,[23] it was held that the power to transfer investigation must be exercised sparingly, cautiously and in exceptional situations. However, in the circumstances of the present case, the high court has passed several interim orders to conduct a proper investigation. Hence, there is no reason for transferring the FIR to the CBI as there is no rarest of rare cases.

The second issue considered is the constitutional courts' power to order further/reinvestigation after the charges are framed. Relying on previous cases

21 (2023) 5 SCC 802.

22 *Himanshu Kumar* v. *State of Chhattisgarh* , 2022 SCC Online SC 884.

23 (2010) 3 SCC 571.

such as *Babubhai* v. *State of Gujarat*[24] and *Ram Jethmalani* v. *Union of India*,[25] the court held that in the interest of conducting a fair investigation and a fair trial, which is a fundamental right of the citizens, the constitutional courts are vested with the power to order further/reinvestigation if the situation demands.

Applying the law laid down by this court in the case of *Dharam Pal*[26] and *Bharati Tamang*[27] the court reiterated that the constitutional court could order further investigation/re-investigation/de novo investigation even after the charge sheet is filed and the charges are framed. The court examined the sequence of events, highlighting key concerns such as the police's refusal to include the Minister and his associates in the FIR, the delay in naming the Minister as an accused, and the fact that the investigation commenced only after the high court's intervention. Additionally, the Minister was initially treated as a witness rather than an accused, and there was evident reluctance to gather crucial evidence, such as CCTV footage. The court concluded that the State did not conduct a proper investigation at the relevant time. Given these circumstances, the necessity for further investigation or reinvestigation was clearly established. Accordingly, the State was permitted to conduct a further investigation. The Supreme Court rightly observed that the high court erred in failing to consider these critical facts while denying further investigation.

In *Union of India* v. *Constable Sunil Kumar*,[28] the issue raised was what is the power of the high court under article 226 to review the punishment imposed on an employee after due process of departmental enquiry conducted for misconduct. The respondent, a constable in CRPF, was charged with misconduct as he, under intoxication, threatened his superiors and colleagues. Based on the report, a departmental inquiry was made, and following the due process as per the service conditions of the respondent, the disciplinary authority passed an order dismissing the respondent from service. The respondent appealed to the appellate authority unsuccessfully and filed a writ petition before a single high court judge challenging the dismissal. The single judge dismissed the petition. An appeal was made before the division bench of the high court. The high court set aside the dismissal on the ground that the misconduct of the respondent did not happen during the duty timings and, therefore, the offence committed by him is less heinous, and as a result, the dismissal is disproportionate to the misconduct. The high court ordered the reinstatement of the respondent without back wages.

The appellant filed an appeal against the said order before the Supreme Court. The contention of the appellant was that the high court, under Article 226, cannot review the quantum of punishment imposed under the disciplinary action merely on the ground of disproportionate. Relying on Commandant, 22nd Battalion,

24 (2010) 12 SCC 254.

25 (2011) 8 SCC 1.

26 *Dharam Pal* v. *State of Haryana* (2016) 4 SCC 160.

27 *Bharati Tamang* v. *Union of India*, (2013) 15 SCC 578.

28 (2023) 3 SCC 622.

CRPF v. *Surinder Kumar*,[29] the power of the high court to review such matters is restricted only when the punishment imposed is strikingly disproportionate to the offence committed. Hence, the court is not justified in quashing the dismissal as there is no perversity or irrationality in the punishment awarded to the respondent. Relying on *Union of India* v. *R.K. Sharma*[30] the Supreme Court, rightly held that the Division Bench of the high court has materially erred in interfering with the order of penalty of dismissal passed on proved charges and misconduct of indiscipline. It was observed by the Supreme Court that only in extreme cases where the punishment awarded is strikingly disproportionate and perversity or irrationality is apparent then only the high court could interfere with the punishment imposed under disciplinary proceedings.

In *S. K. Varshney* v. *Principal*, Our Lady of Fatima HSS[31]the appellant was a teacher employed by an unaided minority private institution and was terminated after conducting an enquiry. Aggrieved by the decision of the school, he filed a writ petition before the single judge of the high court challenged his termination. The single judge dismissed the appeal on the grounds that no writ petition is allowed against unaided private institutions. An appeal was preferred before the division bench of the high court, and the same was dismissed on similar grounds, such as that a writ petition is not maintainable against a private institution.

In an appeal to the Supreme Court, the appellant relying on the observation made by the Supreme Court in *K. Krishnamacharyulu* v. *Sri Venkateswara Hindu College of Engineering*,[32] "when an element of public interest is created and the institution is catering to that element, the teacher, being the arm of the institution, is also entitled to avail of the remedy provided under Article 226" contended that the high court having jurisdiction ought to have decided the case on merits.

However, the Supreme Court held that in *Sushmita Basu* v. *Ballygunge Siksha Samity*,[33] expressly distinguished the ratio of Krishnamacharyulu by holding a writ petition under article 226 is maintainable against private educational institutions only when there is a public law element is apparent. In the present case, the issue is personal, and no such public law element is involved. The high court is justified in dismissing the case for want of jurisdiction.

In *St. Mary's Education Society* v. *Rajendra Prasad Bhargava*,[34] a similar issue was raised. The respondent is working in a private, unaided minority educational institution. He was terminated from the services after conducting a disciplinary enquiry. The respondent appealed under article 226 before the high court. The single-judge bench dismissed the writ petition on the grounds that no writ petition is allowed against private institutions. An appeal was preferred before

29 (2011) 10 SCC 244.
30 (2001) 9 SCC 592.
31 (2023) 4 SCC 534.
32 (1997) 3 SCC 571.
33 (2006) 7 SCC 680.
34 (2023) 4 SCC 498.

the division bench of the high court, and the division bench allowed the appeal on the grounds that a writ petition is maintainable against a private institution if there is a public law element involved. Aggrieved by the decision of the division bench an appeal was preferred to the Supreme Court. The following two contentions were raised in the case

a) Is a writ petition under Article 226 of the Constitution of India maintainable against a private minority institution?

(b) Whether a service dispute in the private realm involving a private educational institution and its employee can be adjudicated in a writ petition filed under Article 226 of the Constitution?

After analysing various precedents, the court held that the high court can exercise the power of judicial review under article 226 against a private body only when a public element in the action of a private body is complained. However, in the present case, the issue is regarding the termination of service, which is a matter of fact relating to the service contract. There is no benefit for the public in the employment matters of a private institution. Hence, the high court has no power to review the same under article 226.

The court summarised the power of judicial review in private matters in the following

i. An application under Article 226 of the Constitution is maintainable against a person or a body discharging public duties or public functions.
ii. The public duty cast may be either statutory or otherwise and where it is otherwise, the body or the person must be shown to owe that duty or obligation to the public involving the public law element.
iii. Similarly, for ascertaining the discharge of public function, it must be established that the body or the person was seeking to achieve the same for the collective benefit of the public
iv. Even if it is assumed that an educational institution is imparting public duty, the act complained of must have a direct nexus with the discharge of public duty.
v. Individual wrongs or breaches of mutual contracts without having any public element as its integral part cannot be rectified through a writ petition under Article 226.
vi. The terms of employment of contract between a school and non-teaching staff cannot and should not be construed to be an inseparable part of the obligation to impart education.

The question that was raised in *State Bank of India* v. *Arvindra Electronics Pvt. Ltd*.,[35] was whether the high court, under Article 226, extends six weeks time to make payment of One Time Settlement(OTS) for Non-Performing Assets. In the present case, the State Bank of India sanctioned a loan in favour of the respondent

35(2023) 1 SCC 540.

in 2012, and in 2015, the respondent's account was classified as NPA. Accordingly, the Bank floated an OTS scheme, which the respondent accepted. At that time, the respondent was informed that non payment of the OTS within the stipulated time would automatically render the OTS infructuous. Certain part payments were made by the respondent to this effect. However, the respondent requested the Bank to grant an extension of 8 to 9 months to pay the final amount of Rs. 2.5 crores, for which the bank declined. The respondent prefers a writ petition under article 226 to the high court. The high court sanctioned an extension of six weeks time to the respondent from the date of the judgment to pay Rs. 2.02 crores with interest. Aggrieved by the judgment, the appellant filed an appeal to the Supreme Court. The issue that arises is whether the high court can grant additional time for the performance of a contract without the other party's consent. Does such apower violate section 62 of the Indian Contract Act?[36]

The Supreme Court held that rescheduling the payment under OTS would amount to a modification of the contract within the meaning of section 62 of the Indian Contract Act. Section 62 deals with novation, where any changes to the existing contract can be undertaken only by the parties. Therefore, the court held that granting an extension of the time amounted to rewriting the contract. Such power is not permitted under Article 226; hence, the high court's judgement was quashed.

In *Hero Motocorp Ltd.* v. *Union of India,*[37] the Supreme Court summarised when a writ of *mandamus* can be issued. The brief factual matrix giving rise to this appeal was that the new industrial units in Uttaranchal and Uttar Pradesh were granted 100% exemption of excise duty wide a memorandum in 2002 for a period of 10 years and a memorandum in 2003 of 100% income tax exemption was granted. After the enactment of the Central Goods and Services Tax, 2017, the exemptions were reduced to 58% through the implementation of the Budgetary Support Policy. Hence, the appellants filed a writ of *mandamus* praying for 100% reimbursement of GST, which was dismissed by the High Courts of Delhi and Sikkim in two separate instances. Therefore, an appeal was preferred by the appellants before the Supreme Court.

One of the submissions was that a writ of *mandamus* could only be issued against a statutory body when such authority has a duty cast upon them, and they failed to perform the duty. It was further submitted that the appellants could not establish any duty of the Union to reimburse 100% GST. The court relied upon the judgement of *The Bihar Eastern Gangetic Fisherman Co-operative Society Ltd.* v. *Sipahi Singh*[38]*.,* wherein it was held that to issue the writ of mandamus it has to be shown that there is a statute which imposes a legal duty on the authorities

36 S. 62. Effect of novation, rescission, and alteration of contract. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract, need not be performed.

37 (2023) 1 SCC 386.

38 (1977) 4 SCC 145.

and the aggrieved party has legal right to enforce the performance of such duty. The court placed reliance on its own the case of *New Delhi* v. *K.S. Jagannathan,*[39] in which it was held that a high court, in the exercise of its jurisdiction under article 226, can issue a writ of mandamus or a writ in the nature of mandamus or pass orders giving directions to the authorities to compel to perform a duty in order to prevent injustice.

Furthermore, the Supreme Court cited another case of *Union of India* v. *Bharat Forge Ltd.,*[40] where the court reiterated the same position that a writ of mandamus in the exercise of powers under article 226 could not be withheld subject to certain indispensable conditions that there must be public duty arising ordinarily out of a statute or through a common charter, common law, custom or even a contract. Furthermore, mandamus would also lie if an authority which had discretion fails to exercise it or acts under another authority. Accordingly, the court refused to grant the relief of 100% GST reimbursement in this case.

In *The State of Goa* v. *Summit Online Trade Solutions (P) Ltd.,*[41] the Appellant was one of the original Respondent in the case pending before the High Court of Sikkhim, wherein a notification issued by the appellant was under challenge. The appellant pleaded for deletion of its name by an application for the reasons that the notification cannot be subject to judicial scrutiny within the jurisdiction of the High Court of Sikkim, especially when no cause of action had arisen within the jurisdiction of the High Court of Sikkim and further the High Court of Bombay at Goa is the appropriate court where the notification can be challenged. The high court had dismissed the application, and hence, the appellant filed this appeal before the Supreme Court. The question before the court was whether the high court was justified in returning the finding that at least a part of the cause of action had arisen within the jurisdiction of this court and was premised on such finding to dismiss the applications.

The Court observed that the Constitution did not define the expression cause of action'. The Court relied on the case of *Cooke* v. *Gill*[42], in which the cause of action was defined as "cause of action means every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgement of the court."The Supreme Court further observed that cause of action in a writ petition would mean the material facts that are necessary to be pleaded and proved by the petitioner to obtain the claim he relied on.

Furthermore, in determining whether the facts pleaded constitute the cause of action under Article 226(2) of the Constitution, the court held that the party invoking the writ jurisdiction has to disclose the essential facts pleaded in support of the cause of action does constitute a cause which empowers the high court to decide the matter and at least a part of the cause of action arose within the jurisdiction of the high court and that the pleaded facts shall have a nexus to the subject

39 (1986) 2 SCC 679.
40 (2022) 17 SCC 188.
41 (2023) 7 SCC 791.

matter. The facts which are irrelevant to grant the prayer would not constitute the cause of action and, as a consequence, would not confer jurisdiction on the Court.

The court placed reliance on its own judgement in the case of *Kusum Ingots* v. *Union of India*[43] and *Ambica Industries* v. *CCE*[44], reiterated that even if a small part of the cause of action arises within the territorial jurisdiction of a high court, the same cannot be a determinative factor to keep alive the writ petitions.

VII LEGISLATIVE COMPETENCY

Pattali Makkal Katchi v. A. Mayilerumperumal[45] deals with issues related to job reservation and the interpretation of Article 16(4A) of the Indian Constitution. The constitutional validity of the Tamil Nadu Special Reservation of seats in Educational Institutions including Private Educational Institutions and of appointments or posts in the services under the State within the Reservation for the Most Backward Classes and Denotified Communities Act, 2021(the Act) was challenged in the present petition. The Act provides a Schedule consisting of the Most Back Word Class (MBC) and Denotified Communities(DNC) categories. This Act was challenged before the High Court of Madras, and the court was asked to answer the following questions in the writ petition.

i) Does the State Legislature have the competency to do the impugned Act after the 102nd Constitutional Amendment Act, 2018 and before the 105th Constitutional Amendment Act, 2021?

ii) Can an Act placed under the Ninth Schedule of the Constitution of India be varied without amending the said Act?

iii) Did the state government have the power to make any decision with regard to backward classes in the teeth of the constitutional provisions, more particularly, Article 338-B of the Constitution of India?

iv) Does the State have the power to provide reservations based on caste?

v) Can the reservation be provided without quantifiable data on population, socio-educational status and representation of the backward classes in the services?

vi) Whether the impugned Act providing reservation of 10.5% to MBC(V), without any quantifiable data, is in violation of Articles 14, 15 and 16 of the Constitution of India?

vii) Can the sub-classification of MBC into three categories be solely based on adequate population data in the absence of any objective criteria?

Regarding questions one to three, the court held that the State Legislature lacks competence to enact the Act. Further, in answering the fourth question, it was observed that no reservations can be provided solely based on caste.

42 (1873) 8 CP 107.
43 (2006) 4 SCC 254.
44 (2007) 6 SCC 769.
45 (2023) 6 SCC 481.

Answering the remaining question, the Court held that reservations should not be provided without quantifiable data relating to the population, socio-economic status, and representation of the backward classes in the services. As a result, the Court declared the Act unconstitutional.

An appeal was preferred to the Supreme Court, challenging the decision of the High Court. Several contentions were raised in the appeal, including a preliminary request to refer the case to a larger bench.

Reference to larger bench

102 Amendment Act inserted article 338 B for the establishment of the National Commission for Backward Class Commission. Correspondingly, the State also established Commissions for the Backward class. One of the issues that was raised in Maharashtra's case, *Jaishree Laxmanrao*[46] the power of the state to recognise Backward Classes was raised. The Supreme Court, while declaring the Maharashtra State Reservation (of seats for admission in educational institutions in the State and for appointments in the public services and posts under the State) for Socially and Educationally Backward Classes (SEBC) Act unconstitutional and held that the state has no legislative competence to determine the Socially and Educationally Backward Classes after the enactment of 102 amendment in view of article 342A. However, 105th Amendment Act amended Article 342A, restricting the list declared by the President to matters relating to list one and permitted the State to identify SEBC for its purposes. The contention of the appellants is that this case involves the interpretation of the substantial question of the interpretation of the Constitution and also the question of whether the 105 amendment is a clarification of the 102 amendments and hence, it dates back to the day the 102 amendments was enacted, hence required the consideration of a constitutional bench. Further, Article 145(3) of the Constitution requires that any case involving substantial question of law as to the interpretation of the Constitution should be heard by a minimum number of five Judges. Refusing the contentions, the court held that there is no question of interpretation of the Constitution involved in determining the retrospective effect of the 105th Amendment Act. Further, if the question had already been decided before, it cannot be said that any substantial question of law arises regarding the interpretation of a constitutional provision.

Legislative competence:

The next contention was that the Act came into existence on February 26, 2021, whereas the 105th Amendment Act was enacted on August 19, 2021. As a result, in view of *Jaishri Laxmanrao,* the Act is unconstitutional as the State has no power to legislate to recognise SEBC as it is the domine of the Parliament as per the amended article 342 A. However, the court rightly held that the 2021 Act was not enacted to determine who SEBC is. The purpose of the Act is to provide sub-classification and the percentage of reservations within the MBCs and DNCs. Therefore, the court opined that this is a permissible exercise of state legislative

46 Jaishree Laxmanrao Patil v. *The Chief Minister* (2021) 8 SCC 1.

power, and such power is not in contravention with the judgement of *Jaishri Laxmanrao*. Further, the 102nd Amendment only imposes restrictions on the State to identify the SEBCs by inclusion or exclusion to the list declared by the President. However, in this case, the recognition of MBC and DNC had already been carried out by the State under the 1994 Act,[47] which was prior to the 102nd Amendment Act. The only exercise carried out by the 2021 Act is to sub-classification between the MBC and DNC, which is expressly permitted by the Supreme Court in *Indra Sawhney*.[48]

Reliance of the judgment in *E.V. Chinnaiah*[49] is unjustified as in *Chinnaiah*; the court held that the State of Andhra Pradesh legislation subdividing the Schedule Castes would amount to interfering with the Presidential list; however, in the present case, the President is yet to publish the list. Hence, no tinkering of the President's list would arise.

The next contention was that the 1994 Act was inserted in the Ninth Schedule; hence, the state has no legislative competence to enact any law relating to the same subject matter and did not find favour with the court. It was held that the legislative competence of the State Legislature could only be restricted by an express provision under the Constitution. In the absence of such restriction under Article 31-B, the State's legislative powers cannot be curtailed. Therefore, it cannot be said that the State lacks legislative competence solely because the 2021 Act addresses matters related or ancillary to the 1994 Act.

The next contention was that the 1994 Act received the assent of the President of India under Article 31-C where, whereas the 2021 Act did not receive the assent of the President; hence, the State does not have the competence to enact the law.

Laws enacted to implement the State's policy under Article 39(b) and (c) are protected from challenges under Articles 14 and 19 by virtue of Article 31-C. However, State laws require the President's assent to avail of this protection. The 1994 Act received such assent as it aimed to secure Directive Principles under Articles 38, 39(b)-(c), and 46. The high court held that the 2021 Act improperly altered the 1994 Act only with the Governor's consent, but in fact, it requires the consent of the President. The Supreme Court held that the high court erred in declaring the Act unconstitutional for lack of Presidential assent since the 2021 Act addresses incidental or ancillary matters of the 1994 Act, and the State has legislative competence. While the President's assent shields a law from constitutional challenges, its absence does not bar the State from legislating on related subjects. Instead, it makes the law open to scrutiny under Articles 14 and 19.

47 the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of seats in Educational Institutions and of appointments or posts in the Services under the State) Act, 1993.

48 1992 Supp (3) SCC 210.

49 *E. V. Chinnaiah* v. *State of Andhra Pradesh* (2005) 1 SCC 394.

Caste as the sole criterion for identification of backwardness

In *Indra Sawhney*, the court expressly held that caste could be an important criterion. A particular caste could be used as a starting point for the identification of backwardness, but it cannot be the sole criterion. Therefore, while identification of backwardness, cast could be used to start with, the state shall justify the identification of any particular caste as a backward class based on reasonable criteria. The court found fault with the state for accepting the recommendation of the Chairman of the Tamil Nadu Backward Classes Commission, based on which the 2021 Act was legislated on the following grounds

i. the recommendations are based on antiquated data
ii. no analysis or assessment of relative backwardness and representation of the communities within the MBCs and DNCs.
iii. Population has been made the sole basis for recommending internal reservation for the Vanniakula Kshatriyas.
iv. There is no substantial basis for classifying the Vanniakula Kshatriyas into one group to be treated differentially from the remaining 115 communities within the MBCs and DNCs,

Based on the above ground, the court held that the classification of backward class under the 2021 Act is in violation of Articles 14, 15 and 16; hence, the judgment of the high court on this aspect was upheld.

Municipal Corporation of Greater Mumbai v. *Property Owner's Association*[50] is another case where the legislative competency is questioned. The Mumbai Municipal Corporation Act of 1888 empowered municipal corporations to impose property tax. Under said Act, the tax on property is imposed on the basis of rateable value. The Act was amended by the Maharashtra Act No. XI of 2009 empowered the Municipal Corporation to impose a property tax on the property's capital value instead of rateable value. The amendment was challenged for lack of legislative competence on the ground that it would covered by Entry 86 of List I of the Seventh Schedule to the Constitution.[51]

The appellants filed a writ petition before the high court and contended that taxes on capital value are the subject matter listed under the Union List, and the state lacks legislative competence to enact the law. However, the Court pointed out that a municipality's levy of property tax is covered under Entry 49 of List II. The court opined that the amendment only uses the asset's capital value to impose a property tax. The capital value is used only to determine the extent of property tax; hence, the State has legislative competency to enact the law. Concurring with the decision of the high court, the Supreme Court held that adopting capital value as a basis or measure of tax on land and building will not attract Entry¬86 of List-I of the Seventh Schedule.

50 (2023) 3 SCC 258.

51 Entry 86:Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.

The second contention was that any property tax levy could be initiated only on the recommendation of the Finance Commission as per Article 243Y. In the present case, the State carried out the amendment without such recommendation by the Finance Commission; hence, the law is unconstitutional. The court held that there is no doubt that the Finance Commission's principal duty is to review the financial position of the municipalities and accordingly submit its recommendations to the Legislature of the State. Therefore, the Legislature of the State is the final authority to take an appropriate action, which will ultimately take an appropriate action.

If the Legislature itself had taken such initiative, such initiative cannot be declared unconstitutional simply because it was not taken after the recommendations of the Finance Committee. If such a proposition is accepted, it would result in a stalemate situation when the Finance Committee does not make any recommendations and the financial health of the municipalities is deteriorating.

The next challenge was that under Article 243X, the tax levy shall be undertaken only by the Corporation consisting of the elected and nominated councillors and not by any other body. In the present case, an authority was created to determine the tax; hence, it is a violation of Article 243X. Again, rejecting the contention, the court held that acceptance of such an interpretation would lead to an absurd outcome. Such a requirement would be impractical for the Corporation to execute.

State of Karnataka v. *State of Meghalaya*[52] is another case where the court was asked to determine the competency of the State imposing tax on lotteries. The states of Karnataka[53] and Kerala[54] passed a law to impose a tax on lotteries. These legislations were challenged in the respective high courts. Both high courts declared that the state has no competency to pass such legislation and asked the states to refund the tax to the States of Nagaland, Arunachal Pradesh, Meghalaya, Sikkim, and others who are the organisers of the lotteries. An appeal was preferred before the Supreme Court.

The issue raised was the potential conflict between Entries 34[55] and 62[56] of List II and Entry 40[57] of List I of the Seventh Schedule of the Constitution of India. The question is whether Entry 40 of List I restrict the scope of the power of the state to impose a tax on betting and gambling under Entry 62 of List II. If the answer is affirmative, the States of Karnataka and Kerala have no legislative competence to pass the impugned laws imposing taxes on lotteries. Based on the submissions of both appellants and the respondents, the court identified the following issues

52 (2023) 4 SCC 416.

53 Karnataka Tax on Lotteries Act, 2004.

54 Kerala Tax on Paper Lotteries, Act, 2005.

55 Entry 34: Betting and gambling

56 Entry 62: Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

57 Entry 40: Lotteries organised by the Government of India or the Government of a State.

i. Whether the subject 'lotteries organised by the Central Government and the State Governments' being carved out of 'betting and gambling' which is dealt with under Entry 34 of List II and being placed in Entry 40 of List I would also exclude the power of taxation on the same in Entry 62 of List II?

ii. Whether the power of taxation on 'betting and gambling' is within the ambit of Entry 62 of List II?

iii. Whether the impugned Acts passed by the Karnataka and Kerala State Legislatures are within the legislative competence of Entry 62 of List II, and are therefore valid pieces of legislation?

Explaining the constitutional scheme of distribution of legislative powers, the court observed that article 246 confers powers to the respective governments on the entries listed in their respective schedules. As a result, the entries outline the legislative competence of the Union and State Legislature. In case of any conflict, List I will supersede List II only when there is no chance of reconcilement between two competing entries. However, if the pith falls in any one of the entries of List II, then it's the domain of the State Legislature, and such competency cannot be questioned on the ground that Union List or Concurrent List covered it.

As the question in the case relates to the taxing power of the state under entry 62 of List II, the court insists on reading the entry with article 265, which states that no tax can be levied or collected without any authority of the law. Explaining the significance of Article 265, the court said that in view of this article, to levy and collect the tax, there shall be an express provision conferring power to the Legislature. Once such a power is conferred on a legislature, the court must interpret such power broadly. Such a power of imposing tax automatically comprises the power to identify the commodities on which tax can be levied, fix the rate, prescribe machinery to exercise such power and the authorities to collect the tax and adjudicate the grievances.

It is pertinent to note that the Parliament has enacted the Lotteries Act of 1998 to regulate the conduct and promotion of lotteries by the Government of India or the government of the state. However, this Act has no provision regarding taxation.

The Karnataka Act was enacted with the sole purpose of imposing tax on lotteries conducted only by the Government of India or the government of a state or a Union Territory or any other country having a bilateral agreement or treaty with the Government of India. This act does not impose any tax on lotteries operated by private entities. On the other hand, the Kerala Act levies tax only on paper-based lotteries conducted by the Government of India, the government of any state or of a foreign country and excludes online lotteries and not for taxation on lotteries organised by private entities. Both Acts are enacted exclusively to impose tax.

Therefore, the Act only provides for taxation of lotteries. Reading together, Entries 34 and 62 of List II, when the activity of betting and gambling includes conducting the lotteries and the regulation and taxing on the same are within the

domain of the state's legislative power. After analysing various cases, the Court summarised the approach regarding how to interpret the Entries in the following manner

i. The Entries in the different Lists should be read together without giving a narrow meaning to any of them.

ii. The powers of the Union and the State Legislatures are expressed in precise and definite terms. Hence, there can be no broader interpretation given to one Entry than to the other.

iii. In case of an apparent conflict between different Entries, it is the duty of the Court to reconcile them in the first instance.

iv. In case of an apparent overlapping between two Entries, the doctrine of pith and substance has to be applied to find out the true nature of a legislation and the Entry within which it would fall.

v. Where one Entry is made 'subject to' another Entry, all that it means is that out of the scope of the former Entry, a field of legislation covered by the latter Entry has been reserved to be specially dealt with by the appropriate Legislature.

vi. When one item is general and another specific, the latter will exclude the former on a subject of legislation. If, however, they cannot be fairly reconciled, the power enumerated in List II must give way to List I.

The court pointed out that the Constitution empowers three broad powers to the Legislature. (i) Entries enabling laws to be made, (ii) Entries enabling taxes to be imposed, and (iii) Entries enabling fees and stamp duties to be collected. When entries on which taxes can be levied are specially mentioned, there is no possibility of conflict arising between the Union and State in imposing tax. In view of Article 265, taxing power can be exercised by the legislation only from a specific tax entry but not on all entries of the list.

Relying on Hoechst Pharmaceuticals Ltd.,[58] the court held that legislative competence and the power to tax could not be deduced from the general legislative Entry as an ancillary power. Therefore, the power to levy the tax is not ancillary to any entry in the list and covers the legislative competency of the respective Legislature.

As a result, Parliament's power under Entry 40 of List I is restricted to only regulating the organisation of lotteries by the Government of India or the government of a state uniformly throughout the country. There is no power expressly conferred on Parliament to impose tax on lotteries. When the power to impose the tax is expressly conferred by Entry 62 of List II, the power of the Parliament under Entry 40 of List I cannot restrict or take away the power of the State to impose the tax. The court attributed the following reasons for such a decision

58 *Hoechst Pharmaceuticals Ltd*. v. *State of Bihar,* AIR 1983 SC 1019.

i. The specific entry of taxation in provided in List II whereas List I has no such express provision

ii. The constitutional scheme does not permit to share the taxation power between the Union and the States.

iii. Betting and gambling is under List II conferring the power to the state to grant permission to conduct any betting or gambling within the state, and lottery being part of gambling taxing such activity is within the legislative domain of the State

iv. Residuary power under Entry 97 of List I cannot be invoked to confer taxing power to the Union.

v. Entry 40 of List I only confers the power to the Parliament to regulate the lotteries organised by the government. Hence, no expansion of the entry is permissible for levying tax.

vi. When the state permits lotteries to be conducted within its territory, the territorial nexus is established in Imposing tax even if the lotteries are conducted by any other State Government or the Government of India. The imposition of such tax cannot be invalidated on the grounds of extra-territorial operation.

With the above observation, the court set aside the high court's judgment and held that the legislation passed by Karnataka and Kerala was constitutionally valid.

The Animal Welfare *Board of India* v. *Union of India*[59] the virus of rules framed by three states, namely Karnataka, Tamil Nadu and Maharashtra, was in question. A division bench of the Supreme Court, while discussing the practice of Jallikattu in Tamil Nadu and the Bullock Cart Race in Maharashtra, Nagaraja held that both sports violated the Prevention of Cruelty to Animals Act, 1960 (1960 Act). The legislation permitting the said sport violates the 1970 Act and hence is void under Article 254 (1) of the Constitution of India. Pursuant to the decision, the Ministry of Environment, Forest and Climate Change issued a notification under the powers conferred by Section 22 of the 1960 Act. The said notification prohibited the exhibition or training of bulls as performing animals with an exception that bulls could be trained as performing animals at events such as Jallikattu in Tamil Nadu and Bullock Cart Races in Maharashtra, Kambala in Karnataka, Punjab, Haryana, Kerala and Gujarat as per the customary practices as part of the culture.

After the notification three states passed the following legislations: The Prevention of Cruelty to Animals (Tamil Nadu Amendment) Act, 2017,("Tamil Nadu Amendment Act"), The Prevention of Cruelty to Animals (Maharashtra Amendment) Act, 2017 ("Maharashtra Amendment Act") and The Prevention of Cruelty to Animals (Karnataka Second Amendment) Act, 2017 ("Karnataka Amendment Act") and these Acts received Presidential assent. The notification

59 (2023) 9 SCC 322.

and these Acts were challenged before the Division Bench of the Supreme Court. After formulating the following five questions, the Division Bench placed the same before the Chief Justice of India with a request to refer the same to a Constitution Bench.

i. "Is the Tamil Nadu Amendment Act referable, in pith and substance, to Entry 17, List III of the Seventh Schedule to the Constitution of India, or does it further and perpetuate cruelty to animals; and can it, therefore, be said to be a measure of prevention of cruelty to animals? Is it colourable legislation which does not relate to any Entry in the State List or Entry 17 of the Concurrent List?

ii. The Tamil Nadu Amendment Act states that it is to preserve the cultural heritage of the State of Tamil Nadu. Can the impugned Tamil Nadu Amendment Act be stated to be part of the cultural heritage of the people of the State of Tamil Nadu so as to receive the protection of Article 29 of the Constitution of India?

iii. Is the Tamil Nadu Amendment Act, in pith and substance, to ensure the survival and well-being of the native breed of bulls? Is the Act, in pith and substance, relatable to Article 48 of the Constitution of India?

iv. Does the Tamil Nadu Amendment Act go contrary to Articles 51A(g) and 51A(h), and could it be said, therefore, to be unreasonable and violative of Articles 14 and 21 of the Constitution of India?

v. Is the impugned Tamil Nadu Amendment Act directly contrary to the judgment in A. Nagaraja, and the review judgment dated 16th November 2016 in the aforesaid case, and whether the defects pointed out in the aforesaid two judgments could be said to have been overcome by the Tamil Nadu Legislature by enacting the impugned Tamil Nadu Amendment Act?

The petitioners contended that the relevant materials are not placed before the President to get his assent, and such presidential assent is required only if the subject matter is in List III of the Seventh Schedule of the Constitution. In the present case, the amendments do fall squarely under List II; hence, the presidential consent is against the constitutional Scheme. However, the Supreme Court held that the amendment Statutes are relatable to Entry 17 of List III of the Seventh Schedule. The 1960 Act was enacted in pursuance of legislative power contained in Entry 17 of List III of the Seventh Schedule to the Constitution of India; hence, the contention was not entertained as presidential consent is necessary for the amendments.

Further, it was noted that the States of Tamil Nadu and Maharashtra have already framed the rules, and the State of Karnataka issued a notification to that effect. The petitioners contend that the amendments are nothing but overriding the judgement of the Division Bench in *A. Nagaraja* did not address the concerns raised by the bench. They further contended that animals have rights, and the

Division Bench in *A. Nagaraj* expressed the opinion that the animals' rights need to be elevated to the status of fundamental rights.

Explaining the legislative stand, the court held that the constitutional scheme for animal rights could be found in Directive Principles and fundamental duties. The Directive Principles impose an obligation on the Legislature to organise animal husbandry in a scientific manner, preserve the breeds, and prohibit the slaughter of cows and calves and other milch and draught cattle, while the fundamental duties cast a duty on the citizens to protect the wildlife and to have compassion for living creatures. After reviewing several decisions, the court said there is no precedent for conferring fundamental animal rights. In light of these observations, the court held that it is not prudent to bring the animals under the purview of fundamental rights, and as such, a move amounts to judicial adventurism.

Customary practice

Answering the issue of these sports are long-standing customary practices; hence, they shall be allowed, the court pointed out that the court has no jurisdiction to decide if a particular event, activity or ritual forms the culture or tradition of a community or region. However, the court said that even if a long-lasting tradition or ritual is against the law, the law courts obviously would have to enforce the law. However, the court pointed out that the decision of *A. Nagaraja* was delivered at a time when the practice of *jallikattu* was a violation of the 1960 Act. The three amendments and the rules introduced several changes in the organisation of these sports. These changes impose rigid regulations that minimise the cruelty to the animals involved in sports.

However, the court also said that there is no guarantee that no pain would be inflicted on this animal after these amendments. Nevertheless, the court made a distinction between prior to *A. Nagaraj,* after the amendments and, said that these new changes substantially diluted the practices followed in these sports. Further, the contention of the petitioner that bulls do not have natural ability like horses to run, the court held that the mere fact that they did not mean to run cannot make the seasonal sports contrary to the 1960 Act.

The next contention of the petitioners is that in spite of the procedure that was changed by the new amendments, the animals are forced to participate in sports involuntarily. Addressing the issue, the court said that there is no absolute protection for the animals from any pain or suffering. The object of the 1960 Act is not to inflict unnecessary pain and suffering on animals.

Based on these observations, the court answered the five questions in the following:

i. The Tamil Nadu Amendment Act is not a piece of colourable legislation. It relates, in pith and substance, to Entry 17 of List III of Seventh Schedule to the Constitution of India. It minimises cruelty to animals in the concerned sports and once the Amendment Act, along with their Rules and Notification are implemented, the aforesaid sports would not

come within the mischief sought to be remedied by Sections 3, 11(1) (a) and (m) of the 1960 Act.

ii. *Jallikattu* is a type of bovine sports and we are satisfied on the basis of materials disclosed before us, that it is going on in the State of Tamil Nadu for at least last few centuries. This event essentially involves a bull which is set free in an arena and human participants are meant to grab the hump to score in the "game". But whether this has become integral part of Tamil culture or not requires religious, cultural and social analysis in greater detail, which in our opinion, is an exercise that cannot be undertaken by the Judiciary. The question as to whether the Tamil Nadu Amendment Act is to preserve the cultural heritage of a particular State is a debateable issue which has to be concluded in the House of the People.

iii. The Tamil Nadu Amendment Act is not in pith and substance, to ensure survival and well-being of the native breeds of bulls. The said Act is also not relatable to Article 48 of the Constitution of India. Incidental impact of the said Amendment Act may fall upon the breed of a particular type of bulls and affect agricultural activities, but in pith and substance the Act is relatable to Entry 17 of List III of the Seventh Schedule to the Constitution of India.

iv. In our opinion, the Tamil Nadu Amendment Act does not go contrary to the Articles 51-A (g) and 51-A(h) and it does not violate the provisions of Articles 14 and 21 of the Constitution of India. (v) The Tamil Nadu Amendment Act read along with the Rules framed in that behalf is not directly contrary to the ratio of the judgment in the case of A. Nagaraja and judgment of this Court delivered on 16th November 2016 dismissing the plea for Review of the A. Nagaraja (supra) judgment as we are of the opinion that the defects pointed out in the aforesaid two judgments have been overcome by the State Amendment Act read with the Rules made in that behalf.

v. The decision on the Tamil Nadu Amendment Act would also guide the Maharashtra and the Karnataka Amendment Acts and we find all the three Amendment Acts to be valid legislations.

VIII DOCTRINE OF PLEASURE

In the case of *State of Himachal Pradesh* v. *Raj Kumar,*[60] the court explained the doctrine of pleasure. The Court observed that as per article 310, every person serving the Union or State holds office during the pleasure of the President or the Governor. The court stated that article 309 is controlled by the doctrine of pleasure under article 310. Article 310 is restrictive in nature; hence, it starts with the words "subject to the provision of the Constitution."

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Therefore, the power make laws/rules under article 309 is subject to the principle of pleasure under Article 310.Furthermore, the court stated that this provision to provide public employment on the basis of tenure at pleasure is based on public policy, public interest and public good. The court relied on the case of *Union of India* v. *Tulsiram Patel,*[61] in which the relationship between the government and its employees was explained as follows:

i. Such relationship is subject to the express provisions of the Constitution;

ii. The doctrine of pleasure relates to the tenure of a government servant;

iii. The Constitutional provisions under which the pleasure doctrine is not applicable are to be found under Article 218 with respect to Judges of the High Courts, Article 148(1) with respect to Comptroller and Auditor-General of India, Article 324(1) with respect to the Chief Election Commissioner, and Article 324(5) with respect to the Election Commissioners and Regional Commissioners;

iv. Article 311(1) and Article 311(2) imposes restriction on President and the Governor on exercise of their powers under Article 310(1);

v. Article 309 though not an exception to Article 310(1) is subject to the same and confers the appropriate legislatures to make rules/laws;

vi. Article 311 under clauses (1) and (2) expressly restrict the manner in which a Government servant can be dismissed and where an Act or rule is not framed under Article 309 such removal would be void.

The court relied on another case of its own, *Roshan Lal Tandon* v. *Union of India,*[62] in which it was held that the relationship between the State and its employees is 'status' and not a contract.

The court laid down the following principles:

i. Every person employed in civil service of the Union or State holds office during the pleasure of the President or Governor except if there is an express constitutional provision. The tenure at pleasure is a constitutional policy for public interest and public good;

ii. The Union and the States have powers to make laws/rules under Articles 309, 310 and 311 to regulate recruitment, conditions of service, tenure and termination. Furthermore, the services attain a status by virtue of the relationship of the rights and duties imposed by a statue or rules;

iii. The hallmark of a status is that the government can unilaterally frame and alter the legal rights and obligations without the consent of the employee;

iv. All the matters with respect to employment, terms of service and termination are governed by the rules and there are no rights outside the provisions of the rules;

61 (1985) 3 SCC 398.

62 (1968) 1 SCR 185.

v. There is only a right to be considered fairly and no right to be appointed;

vi. Conditions of service including matters of promotion and seniority are governed by the extant rules;

vii. The government is equally bound by the rules. There is no power or discretion outside the provision of the rules.

IX ARTICLE 324 FREE AND FAIR ELECTION

Free and fair election is the backbone of Indian democracy. Recognising its importance, the Indian Constitution gave the Election Commission a constitutional status with the task of conducting both national and state elections. However, the appointment of the Chief Election Commissioner and the other Election Commissioners is a persisting issue due to the nature of the political appointments, and usually, the contention is that the appointees of the ruling party favour conducting the elections. Several committees recommended electoral reforms where Election commissioners' appointments were prominently mentioned. In *Anoop Baranwal* v. *Union of India*,[63] the apex court was asked to consider the real effect of Article 324, particularly the appointment of the Election Commissioners, with a request to intervene in developing a foolproof and transparent system of appointment of members of the Election Commission. After receiving the petition and hearing both parties, the Division Bench expressed its opinion that this case is involved in the interpretation of article 324, and the same was not debated in any previous cases; it recommended placing the matter to the Constitutional Bench. Accordingly, the matter was referred to the Constitutional Bench.

In total, four writ petitions were filed. These writ petitions made the following prayers to the court.

i. Issue a writ of Mandamus or any other appropriate writ or order, directions directing the Union Government to ensure a fair, just and transparent process of selection by constituting a neutral and independent collegium/ selection committee to recommend the name for the appointment of the member to the Election Commission under Article 324(2) of the Constitution of India;

ii. Direct the Central Government to take appropriate steps to provide same and similar protection to both the Election Commissioners so that they shall not be removed from their office except in like manner and on the like grounds as the Chief Election Commissioner;

iii. Direct the Central Government to take appropriate steps to provide independent secretariat to the Election Commission of India and declare its expenditure as charged on the consolidated. fund of India on the lines of the Lok Sabha / Rajya Sabha secretariat;

iv. Direct the Central Government to take appropriate steps to confer rule making authority on the Election Commission of India on the lines of the

63 (2023) 6 SCC 161.

rule making authority vested in the Supreme Court of India to empower it to make election related rules and code of conduct;

v. Take such other steps as this Court may deem fit for strengthening the office of the Election Commission of India and allow the cost of petition to petitioner.

The factual background leading to the case is the vacancy that was not filled in the Election Commission of India.

Article 324 (2) expressly mentioned that the appointment of the Chief Election Commissioner and the other Election Commissioners is subject to the law made by the Parliament. Therefore, as long as the law is not made by the Parliament, it is the President who would appoint them on the advice of the Council of Ministers. It was precisely such an appointment that caused unanimous concern among the Members of the Constituent Assembly at the time of enacting the Constitution. After a careful reading of the Constituent Assembly Debates and the Sub-committee reports, it is clear that they are in agreement that the law must be made by the Parliament. Further, unlike the appointments of the judges of the Supreme Court and High courts where an expression was used in the Constitution that the President, in consultation with the Chief Justice, appointed the judge, Article 324 (2) did not articulate the consultation but instead uses the law made by the Parliament. It is in the clear contemplation of the maker of the Constitution that Article 324(2) is incorporated to safeguard against the abuse of the power of the appointment of Election Commissioners by the Executive.

Therefore, the legislative intent in drafting article 324 (2) is clear that the appointment of the Election Commissioners shall not be exclusively with the Executive. Hence, the words 'subject to any law to be made by Parliament' were incorporated. However, no such law was passed even after seven decades. As a result, there is a vacuum exists in these appointments. The appointment of Election Commissioners by the President is only a stopgap arrangement until the Parliament passes the law. The refusal of Parliament, despite what was contemplated by the Founding Fathers and various reports on electoral reforms, caused the court to feel that there was a need to intervene to lay down guidelines/norms with regard to the appointment until the Parliament made the law. The court laid down the following norms:

i. The appointment of the Chief Election Commissioner and the Election Commissioners shall be made by the President on the advice of a Committee consisting of the Prime Minister, the Leader of the Opposition of the Lok Sabha, and in case no leader of Opposition is available, the leader of the largest opposition Party in the Lok Sabha in terms of numerical strength, and the Chief Justice of India. This will be subject to any law to be made by Parliament.

ii. Other Election Commissioners are not entitled to the same protection as given to the chief election commissioner. The court held that it is the Parliament which is competent to take such a decision.

iii. Regarding independent secretariat/charging expenditure on the consolidated fund of India, the court found that there is merit in the argument. However, its being a policy decision the court is inclined to decide. Again the Court said that it is for the Parliament to decide.

The judgment assumes importance due to the fact that the role of the Election Commission during the elections was under severe criticism. Allowing the President to appoint Election Commissioners on the advice of the Prime Minister is nothing but endorsing the majority political party. It is not unheard of that political parties in power try to misuse such power and appoint personnel who could be loyal to them. A biased Election Commission (ECI) would be a blow to democracy. This judgment is significant as it seeks to fortify the impartiality of the ECI, a body crucial for conducting free and fair elections in India. By advocating for a more balanced appointment process, the court underscored the importance of insulating the Election Commission from potential political pressures, thereby strengthening the democratic framework of the country. It is hoped that this judgement will be the beginning of the long-pending electoral reforms, bringing transparency and accountability to the election in a fairer and more transparent manner. This would strengthen the Election Commission's ability to make decisions without fear and bring the confidence of the people of India into the election process.

X ASYMMETRIC FEDERALISM

Government of NCT of Delhi v. *Union of India*[64] raises a contest of powers between the Union Government and National Capital Territory Delhi. The contest had been on the rise, particularly when two different political parties were in power. In the present case, the issue was which government would have control over NCTD's service. This question was raised due to a notification issued by the Union Ministry of Home Affairs, Union of India. The notification empowered the Lieutenant Governor of National Capital Territory of Delhi (NCTD) to exercise control over "services" "to the extent delegated to him from time to time by the President" in addition to "public order", "police", and "land." The notification also states that the Lieutenant Governor may seek the views of the Chief Minister of NCTD at his "discretion".

The bone of contention is that the subject of "Services" is mentioned under Entry 41 of the State List. The notification excludes Entry 41 of the State List which deals with "State Public Services; State Public Services Commission", from the scope of powers of NCTD as NCTD does not have its own State public services. The fundamental issue for consideration before the Supreme Court is what is the scope of legislative and executive powers of the Union and NCTD with respect to the subject of "Service".

The issue of whether NCTD is similar to the Union Territory or not has already been decided by the Constitution Bench in 2018, where the Bench categorically held that NCTD is not similar to other Union Territories. The reason behind such a decision is the insertion of article 239AA, which accorded a special

64 (2023) 9 SCC 1.

status to NCTD, which sets NCTD apart from other Union Territories. The Constitution (Sixty-ninth Amendment) Act, 1991, which inserted article 239 AA, provides a special status to Delhi and provides a Legislative Assembly, Council of Ministers, and cabinet system of government, akin to a regular state albeit with certain restrictions. As a result, Delhi had become NCTDC and now has an elected representative form of government. However, while affording the residents of Delhi to elect their own representatives, the amendment strikes a balance with the national interest of the Union of India. Hence, the court in 2018 held that the status of NCTD is not the same as that of any other Union Territories which are covered under Part VIII of the Constitution.

With regards to the legislative and executive power of NCTD, Article 239AA(3)(a) expressly confers the power with respect to matters in the State List and the Concurrent List to NCTD except entries 1, 2, and 18 of the State List, and entries 64, 65 and 66 of List II insofar as they relate to the entries 1, 2, and 18. However, Article 239AA (3)(b) confers on Parliament the power "to make laws with respect to any matter" for a Union Territory or any part of it. While reconciling these two provisions, it was observed that though the NCTD has legislative powers on List II and III(except entries 1,2, and 18 and 64,65, 66 as mentioned above), Parliament has legislative competence in all the entries of List II and III.

This provision makes NCTD different from other states. Regarding the question of legislative and executive power of the Union over the entries of List II, the court held that Union executive power is extended only to entries 1,2 and 18. However, the judgment clarifies that by virtue of article 239AA (3)(b), if the Parliament enacts any law on any entry in List II and III, the executive power of the NCTD would restricted by the law enacted by Parliament.

Explaining the special treatment bestowed on NCTD, the court points out that such special treatment is not unknown to the Constitution as Article 371 confers special provisions to different states. The contention of the Union is that Delhi, being the capital of the country in the interest of nation precedence, shall be given to the Union, and hence, the phrase used "in so far as any such matter is applicable to Union Territories" and "Subject to the provisions of this Constitution" must be read in a narrow manner to give supremacy to the Union. However, this submission did not find favour from the court. The court opined that the phrase "Subject to the provisions of this Constitution" is not unique to Article 239AA. It was used in several places, and such phrases were used to keep legislative power within the limits prescribed by the Constitution.

In light of the above observations, the court held that the legislative power of NCTD under article 239AA(3) is to be guided by the broader principles and provisions of the Constitution. Quoting Ambedkar in the Constituent Assembly, the court pointed out that the Constitution adopted a federal model, and the constitutional scheme is to keep the Union and the States operating within their legislative domains. The court reminds that the States are not subservient to the Union. They are independent and have exclusive legislative domain; the Union cannot interfere with them.

Nonetheless, NCTD is not a state in the actual sense as it is not a state under the First Schedule to the Constitution. Yet, the amendment conferred powers similar to the state with regard to List II and III. The NCTD has its own legislature with a democratically elected government that is answerable to the people of NCTD. Though the legislative power is restricted by virtue of article 239AA(3), in many aspects is similar to States. The court said that :

> In that sense, with addition of Article 239AA, the Constitution created a federal model with the Union of India at the centre, and the NCTD at the regional level. This is the asymmetric federal model adopted for NCTD. While NCTD remains a Union Territory, the unique constitutional status conferred upon it makes it a federal entity for the purpose of understanding the relationship between the Union and NCTD. The majority in the 2018 Constitution Bench judgment held that while NCTD could not be accorded the status of a State, the concept of federalism would still be applicable to NCTD.

In light of these observations, the court finds that there is a need for cooperation between the Union and NCTD in a manner similar to that of the Union and the States. The scheme of the Constitution in creating NCTD is to accommodate the interests of different regions and to preserve local aspirations. In other words, it is the Constitution that promotes Unity in Diversity.

As both Parliament and the Legislature of NCTD have legislative competence over List II and List III, it essentially makes List II and List III "concurrent lists" for NCTD. As a result, the executive power of the NCTD extends to List II and III only in the absence of law by Parliament. Therefore, NCTD's control over the entry of "Services" excludes 'public order', 'police', and 'land'. The Lieutenant Governor is bound by the aid and advice of the Council of Ministers of NCTD in relation to matters within the legislative scope of NCTD.

In view of the discussion above, the Court provided following conclusions:

i. There does not exist a homogeneous class of Union Territories with similar governance structures;

ii. NCTD is not similar to other Union Territories. By virtue of Article 239AA, NCTD is accorded a "sui generis" status, setting it apart from other Union Territories;

iii. The Legislative Assembly of NCTD has competence over entries in List II and List III except for the expressly excluded entries of List II. In addition to the Entries in List I, Parliament has legislative competence over all matters in List II and List III in relation to NCTD, including the entries which have been kept out of the legislative domain of NCTD by virtue of Article 239AA(3)(a);

iv. The executive power of NCTD is co-extensive with its legislative power, that is, it shall extend to all matters with respect to which it has the power to legislate;

v. The Union of India has executive power only over the three entries in List II over which NCTD does not have legislative competence

vi. The executive power of NCTD with respect to entries in List II and List III shall be subject to the executive power expressly conferred upon the Union by the Constitution or by a law enacted by Parliament;

vii. The phrase 'insofar as any such matter is applicable to Union Territories' in Article 239AA(3) cannot be read to further exclude the legislative power of NCTD over entries in the State List or Concurrent List, over and above those subjects which have been expressly excluded;

viii. With reference to the phrase "Subject to the provisions of this Constitution" in Article 239AA(3), the legislative power of NCTD is to be guided, and not just limited, by the broader principles and provisions of the Constitution; and

ix. NCTD has legislative and executive power over "Services", that is, Entry 41 of List II of the Seventh Schedule because: (I) The definition of State under Section 3(58) of the General Clauses Act 1897 applies to the term "State" in Part XIV of the Constitution. Thus, Part XIV is applicable to Union territories; and (II) The exercise of rule-making power under the proviso to Article 309 does not oust the legislative power of the appropriate authority to make laws over Entry 41 of the State List.

XI CONCLUSION

Constitutional functionaries are placed on different pedestals compared to private individuals. The constitutional values bind them as they swear by pledging their allegiance to the Constitution before becoming constitutional functionaries. Ministers are public servants. When they act in the capacity of Ministers or Members of the Legislature, they represent the State. Therefore, they have a higher responsibility for their conduct. The obligation on the part of these members to uphold the Constitution is on a higher pedestal than that of a private individual, as they are the constitutional functionaries. The Constitution expects the freedom of speech conferred on the citizens to be exercised within the permissible limits of the Constitution. When the State controls the citizens' behaviours, the members of the state are not permitted to make any statement that undermines the constitutional values with impunity, as permitting such behaviour would be outrageous. The question of whether the Minister makes such statements in his/her personal capacity or in discharging public function raised in *Kaushal Kishor* should not matter. Even for that purpose, once such statements are made, whether they were made on public or private platforms, has no relevance. Once a person elected as a member of the Legislature is bound by the oath of his office as he/she subscribed allegiance to the Constitution and its norms. As constitutional functionaries, ministers have the highest obligation to promote the fundamental rights and the true values of the Constitution of India. Therefore, they are duty-bound to uphold the true spirit of the Constitution. Hence, any speech by these

functionaries that promotes hate and division of the people shall be treated as the highest crime and shall be disqualified from occupying any constitutional post.

Anjali Bhardwaj once again raised concerns about transparency in judicial appointments. While it is undeniable that transparency is crucial for safeguarding judicial independence, the key question remains: should every discussion among collegium members be disclosed to the public, or should only the final decisions and recorded minutes be made available? The court rightly held that only the signed minutes of the collegium meetings would be in the public domain, not the details of deliberations. This aligns with standard practices for meetings involving public officials. If the court were to recognise a fundamental right for the public to access discussions among collegium members, it would set a precedent requiring all meetings of public functionaries to be made public. The RTI Act grants access only to recorded information, not oral discussions or deliberations. Requiring full disclosure of collegium discussions could set a precedent where all the discussions and oral decisions that are not finalised to be disclosed by public functionary meetings would hinder the process and disrupt the administration.

Anna Mathews raises another aspect of judicial appointments. The elevation of persons with political affiliations to the court is the concern in this case. Apart from clearly explaining the difference between eligibility and suitability of the candidate for appointment of a judge in the high court, the court said that political affiliations are one of the facts that is considered while recommending the appointment of the judges, but that alone cannot be a disqualification for the post. Judges are humans and will have their own minds and be aligned to different social philosophies. Similarly, they may be associated with certain political ideologies, religious beliefs, and economic orientations. These are inherent, and it would be difficult to disqualify from becoming the judge. The fundamental criteria are, in spite of their beliefs, whether such a person can objectively discharge his/her functions as a judge. We have witnessed many of the finest judges, both in the Supreme Court and high court, who lean toward some of these but uphold constitutional values irrespective of their ideologies.

Pattali Makkal Katchi highlights the issue of reservations within the category. Subdivision of categories, though permitted within the existing quota for backward class, the court found that the 10.5% internal reservations to the Vanniyar caste are unconstitutional. The caste politics and the reservations as political mileage continue to dominate Indian politics. The demands of reservations to *Marathas, Jhats*, and other dominant groups in India emphasise how the policy of reservation, which was introduced to mainstream the backwards, had become a fertile ground for political gains.

Reiterating the well-established interpretation regarding the resolution of conflicts in legislative power between the Union and the State, the court in the *State of Karnataka* rightly held that if the State, by virtue of List II, possesses legislative authority, it would be empowered to impose the tax. The case of the Animal Welfare Board of India is another instance where legislative competence

was questioned, specifically in the context of protecting animal rights during sports such as *Jallikattu* and bull races. This case raises a crucial question: can the use of animals in various sports for human entertainment be legitimised under the guise of long-standing traditions followed by respective societies? Although the court acknowledged that long-standing customary practices must yield to constitutional values, its assumption that the new amendments significantly reduce cruelty to animals participating in such sports does not seem entirely reasonable. The court observed that it could not assume that the safeguards proposed by the new amendments would not be strictly implemented. However, the historical implementation of such lofty ideals does not inspire confidence in the state's ability to ensure animal welfare, especially when political mileage is often directly linked to upholding popular practices.

Another argument was that some of these sports also involve human participation, endangering human lives. The court dismissed this contention by citing the *volenti non fit injuria* principle. While this reasoning holds to some extent, it raises an important question: what about the state's role in prohibiting the consumption of other dangerous substances? It would be difficult to wholly accept the notion that individuals have absolute control over their own bodies, as the State is interested in protecting its citizens' lives. Therefore, the effectiveness of these amendments and the quantum of pain that can be caused to the animals warrant deeper scrutiny.

Anoop Baranwal raises the question of transparency again in the appointment of high constitutional positions. This case deals with the appointment of the Election Commissioner, whose office was vacant on May 15, 2022 due to the promotion of one of the Election Commissioners as a Chief Election Commissioner. Thereafter, no appointment was carried out; hence, a writ petition was filed for an interim order for the appointment of the Election Commissioner. The commencement of the hearing of the case started on November 17, 2022. The matter was posted for the next hearing on November 22, 2022. However, on November 18, 2022, the President filled the vacancy. This appointment was challenged on the grounds that when the writ petition for interim relief for the appointment of the Election commissioner was pending, the President could not fill the vacancy, and the manner in which the appointment was made appeared hasty. The court found that three out of four of the Officers recommended for the post had superannuated during the last two years. The candidate appointed as Election Commissioner applied for voluntary retirement on November 18, 2022. The same was accepted by waiving the three-month notice period, and he was appointed as Election Commissioner on the same day. The manner in which the Election Commissioner's appointment raised several criticisms also exhibits the opacity in appointing the high constitutional positions.

An independent Election Commission is essential to the very essence of a functioning democracy. Free and fair elections serve as the cornerstone of the Rule of Law and ensure the smooth operation of democratic processes. The case

of *Anoop Baranwal* highlights how political parties perceive the Election Commission—recognizing its crucial role in conducting elections yet remaining conveniently silent on enacting laws governing its appointment. This selective inaction aligns with their broader goal of consolidating power, reflecting the intersection of political interests and institutional integrity. It is expected that the judgment may pave the way towards more transparent appointment.

Thus, this year's annual survey raises the issue of constitutional responsibility for its functionaries. When these functionaries are elected/selected to enforce constitutional norms, they are duty-bound to follow the norms they are expected to enforce. By following these norms they must inspire private individuals to follow these values by not only abiding but also internalising them in their private lives. With the proliferation of social media platforms, the line between private and public speech is increasingly blurred. As a result, one should be cautious about their words and actions, whether in public or private, particularly when such words and actions are against the cherished values of the apex law of this country, the Constitution of India.