10

CONSTITUTIONAL LAW-II

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I INTRODUCTION

CONSTITUTION IS a living document, and in that sense it is dynamic. The dynamism of the Constitution essentially depends on a vibrant judiciary. Legislature, executive, lawyers and scholars often make several interpretations to the Constitution based on different arguments. Such interpretations could be legitimized only with the final approval of the judiciary. As a result, inculcating the constitutional culture in the governance of the country though carried on by the executive, the ultimate obligation largely falls on the judiciary. There is no doubt that such an obligation was gracefully carried out by the Indian judiciary by expanding the constitutional concepts in areas of constitutional silence or abeyance. In the process, various compelling implied limitations that are logical and practically necessary were churned out for constitutional governance. Constitution protects the citizens from excessive and arbitrary powers of administration. It makes the administration accountable to the people. Constitution of India belongs to the people and Indian judiciary takes that to heart by reflecting and moulding it to the needs of the people. This year survey focuses on the role of the judiciary in keeping the exercise of constitutional power within the limits of the Constitution.

II POWER OF PRESIDENT TO GRANT PARDON: ARTICLE 72

The prerogative power of the President to grant pardon had never been as controversial as it has been in recent times. It became controversial due to the contradicting opinions expressed by the Supreme Court in *Devender Pal Singh Bhallar* v. *State of N.C.T. of Delhi*[1] and *Manhendra Nath Das* v. *Union of India*[2] cases in 2013. The plea of commutation of death sentence on the ground of inordinate delay in disposing of the clemency petition was dismissed in *Bhullar*,

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1 (2013) 6 SCC 195.

2 (2013) 6 SCC 253.

thereby raising serious problems of constitutional interpretation.[3] Once again the power to grant pardon and the effect of delay in rejecting the pardon reached the apex court in *Shatrughan Chauhan* v. *Union of India*.[4] Several writ petitions were filed by convicts, their family members and NGOs under article 32 of the Constitution of India when the mercy petitions were turned down by the Governor and the President of India. The major contention in these petitions was that rejection of the mercy petitions is unconstitutional as it was passed without considering the supervening events that were crucial in deciding the mercy petition. Further, Peoples Union for Democratic Rights (PUDR) requested the court to give directions in respect of procedure to be followed by the President and Governor while considering the mercy petitions. The contention of the petitioners was that every prisoner has a right to get protection under article 21 as it confers the power to the court to protect prisoners "even if the noose is being tied on the condemned prisoner's neck".

The petitioners asserted the following events as the supervening circumstances that lead to entitlement for commutation of death sentence to life imprisonment.

Delay

It is well settled law that unreasonable delay in execution of death sentence deprives a person's life and liberty within the meaning of article 21 as it has a dehumanizing effect.[5] However the respondents contended that the power under article 72 being discretionary cannot be altered, modified, curtailed or even interfered within any manner. The powers exercised by the President in this regard are special and prerogative; they override all other laws, rules and regulations. As a result mere delay in execution itself would not entail commutation of death sentence into life imprisonment. The elaborate procedure that is required for disposing of mercy petition make it difficult to the President to dispose the petition expeditiously. The contention of the respondent is that the procedure followed in dealing with mercy petitions is lengthy and cumbersome.

The procedure in mercy petition starts with governor and ends with President and at each stage the material facts need to be ascertained with the help of relevant documents. Procuring the documents and sending them to the concerned authorities and assessment of health status of the prisoner by different authorities like state/ prison takes lot of time. Further repeated mercy petitions filed by several family members also causes delay. Therefore there cannot be a specifictime limit for examination of mercy petitions. Keeping these things in view no time limit was prescribed under article 72 for disposing of any mercy petition. Hence, commutation of death sentence merely on the ground of delay in disposing of mercy petition as being violative of article 21 is not advisable.

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3 See, Dr. M.R.K.Prasad, 'Constitutional Law' – XLIX *ASIL*, 332-333 (2013).

4 2014 (1) SCALE 437.

5 *T.V. Vatheeswaran* v. *State of Tamil Nadu* (1983) 2 SCC 68.

However, this contention did not find any favour with the Supreme Court. The court reiterated that undue delay in disposing of the mercy petition should be considered sufficient to entitle the person for commutation of the sentence under article 21. Prolonged suspense on execution would adversely affect the physical and psychological condition of the convict. The court could not ignore the impact of delay on the convict and such delay beyond the control of the convict, mandates the commutation of death sentence.

With regard to the cumbersome procedure, the court found a very interesting fact that until 1980 the mercy petitions were disposed of in minimum of 15 days and in maximum of 10-11 months. From 1980 to 1988 the time increased to an average of 4 years. During this time two cases *Vatheeswaran*[6] and *Triveniben*[7]that were decided by the Supreme Court paved way in developing the jurisprudence of commuting the death sentence on the ground of undue delay. It was observed that these two decisions positively impacted on disposing of the mercy petitions from 1989 to 1997. During this period the average time taken for disposing of the mercy petitions were broughtdown from 4 years to 5 months. However it is pertinent to note that now the time taken to dispose of the same mercy petitions rose to 12 years. In the light of these facts the court agreed that the guidelines for the exercise of power under article 72 and 161 cannot be laid down and suggested that the union government include "the delay that may have occurred in disposal of a mercy petition" as an additional criteria to the criteria already set by various circulars in deciding the mercy petitions.[8]

Distinction between offences under Indian Penal Code, 1860 (IPC) and other legislations

The question that was raised in the light of the ratio laid down in *Devender Pal Singh Bhullar* v. *State (NCT) of Delhi* [9] is whether the delay in disposal of

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6 *Ibid.*

7 *Triveniben* v. *State of Gujarat* (1988) 4 SCC 574.

8 Union Government by way of several circulars created the following criteria in disposing mercy petitions;

(i) Personality of the accused (such as age, sex or mental deficiency) or circumstances of the case (such as provocation or similar justification);

(ii) Cases in which the appellate court expressed doubt as to the reliability of evidence but has nevertheless decided on conviction;

(iii) Cases where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified;

(iv) Where the high court on appeal reversed acquittal or on an appeal enhanced the sentence;

(v) Is there any difference of opinion in the bench of high court judges necessitating reference to a larger bench

(vi) Consideration of evidence in fixation of responsibility in gang murder case

vii) Long delays in investigation and trial *etc*.

9 (2013) 6 SCC 195.

mercy petition entitle a death convict under Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA) for commutation?. Responding in the affirmative it was held that the only relevant consideration for the commutation of sentence is undue delay caused wherein the convict was not responsible for such delay. Other considerations such as gravity of the crime, extraordinary cruelty involved thereinor some horrible consequences for society caused by the offence could not be considered for refusing the commutation. It was very aptly pointed out by the court that after *Bachan Singh*,[10]considering those grounds would make no sense as the sentence of death can be imposed only in rarest of rare cases. As a result the court held that the ratio laid down in *Devender Pal Singh Bhullar* is *per incuriam*.

Insanity/mental illness/schizophrenia

Two convicts raised the issue of insanity as the second supervening circumstance that required consideration in commutation of death sentence. The contention was that undue delay in deciding mercy petition has resulted in chronic psychotic illness and thereby execution of death sentence will be inhuman and against article 21 and also violative of well-established principles of human rights.

Court after referring to various conventions and documents of United Nations (UN) which prohibit the execution of death sentence on an insane person held that insanity/mental illness/schizophrenia is a crucial supervening circumstance. Hence it could be a ground for commutation of death sentence into life imprisonment.

Solitary confinement

Most of the petitioners raised solitary confinement as another supervening circumstance for commutation. Most of these petitioners were confined in solitary confinement from the date of imposition of death sentence by the sessions court. Such act being contrary to the provisions of the IPC, the Code of Criminal Procedure (Cr PC), Prisons Act, 1894 and articles 14, 19 and 21 of the Constitution, petitioners requested the court to commute the death sentence. However, the respective sates denied that there had been solitary confinement and stated that they were kept only in statutory segregation. The court held that such segregation even mollified and modified marginally is still violation of section 30 of the Prisons Act, 1894. The meaning of the term 'prisoner under sentence of death' would mean a prisoner whose sentence is finalized, *i.e.*, only when his mercy petition is rejected by the President and on further application, there is no stay of execution by the authorities. During the period between the first conviction to till 'to be under a finally executable death sentence' prisoner cannot be kept neither in any solitary confinement nor in custodial segregation. Prisoner can be kept in custodial segregation during the period between finally executable death sentence and the actual date of execution of death sentence. Court expressed its anguish on violating the rights of the prisoners in spite of prohibiting solitary confinements in its earlier judgments in *Sunil Batra* and *Triveniben*. However, the court was inclined to recognize solitary confinement as a ground to commute the death sentence.

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10 *Bachan Singh* v. *State of Punjab* (1980) 2 SCC 684.

Judgments declared *per incuriam*

Does reliance by the trial court on cases which were doubted or held *per incuriam* warrants the Supreme Court to commute the sentence? The court held that the decision cited by the petitioners[11]were neither found to be erroneous nor decided wrongly. These cases only clarified certain factual situations and hence there was no need to give importance to the issue of *per incuriam*.

Procedural lapses

Petitioners claim that the procedure prescribed in disposing of the mercy petitions were generally not adhered to and several lapses on the part of the government officials in observing the procedure resulted in injustice to the convicts and their family members, hence warranted the commutation. It is undeniable that the elaborate procedure laid down in dealing with mercy petition is to satisfy the test of reasonable procedure under article 21. However, all the petitioners contended that the primary reason for delay in deciding the mercy petitions is non adherence to the rules. Though the court elaborately explained various lapses in adherence to the procedure in each case, declared that the sentence be commuted on the ground of inordinate delay that range from 8 to 12 years. It is not clear whether commutation is possible purely on non-adherence of the procedure, where delay may not have incurred.

Guidelines

One of the petitioners,'Peoples' Union for Democratic Rights' prayed that the Supreme Court issue guidelines governing the procedure of filing mercy petitions and for the cause of the death convicts. Looking into the plight of several petitioners, the following guidelines were issued by the Supreme Court in *Shatrughan Chauhan* for safeguarding the interest of the death row convicts.

(i) Solitary confinement: Any kind of solitary or single cell confinement before the rejection of the mercy petition by the President is unconstitutional.

(ii) Legal aid: Legal aid, being a fundamental right, should be provided to the convicts at all stages. Superintendent of Jails shall inform not only the convict but also the nearest legal aid centre about the rejection of mercy petition.

(iii) Procedure in placing the mercy petition before the President: Once the mercy petition is rejected by the Governor, all necessary materials and documents should be collected at once. Government of India shall fix a time limit within which the authorities must forward the petition along with the necessary documents to the Ministry of Home Affairs. Then the Ministry

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11 Following are the cases on which the petitioners cited as *per incuriam Machhi Singh* v. *State of Punjab* (1983) 3 SCC 470; *Ravji alias Ramchandra* v. *State of Rajasthan* (1996) 2 SCC 175; *Sushil Murmu* v. *State of Jharkhand* (2004) 2 SCC 338; *Dhananjoy Chatterjee* v. *State of W.B.* (1994) 2 SCC 220; *State of U.P.* v. *Dharmendra Singh* (1999) 8 SCC 325 and *Surja Ram* v. *State of Rajasthan* (1996) 6 SCC 271.

of Home Affairs has to send the recommendation/their views to the President within a reasonable and rational time. In spite of taking all these measures, if there is no response from the office of the President, the Ministry of Home Affairs shall be required to send periodical reminders for early decision.

(iv) Communication of rejection of mercy petition by the Governor: The decision of the Governor in rejecting the mercy petition must be communicated to the convict or his family members in writing or through some other mode of communication available.

(v) Communication of rejection of the mercy petition by the President: In case of rejection by the President, all states should duly inform the prisoner and their family members.

(vi) Right to receive copy: Death convicts shall have the right to receive acopy of the rejection of the mercy petition by the President and the governor.

(vii) Minimum 14 days notice for execution: There is inconsistency among the prison manuals regarding minimum period between the rejection of the mercy petition and execution. Therefore, it is necessary that aminimum period of 14 days be stipulated between thereceipt of communication of the rejection of the mercypetition and the scheduled date of execution. The 14 days period was prescribed by the Supreme Court keeping the following aspects in view:

a. To enable the prisoner to prepare himself mentally forexecution, to make his peace with God, prepare his will and settle other earthly affairs.

b. It allows the prisoner to have a last and final meeting with his family members.

c. It also allows the prisoner's family members to make arrangements totravel to the prison which may be located at a distant place and meet the prisoner for the lasttime.

d. To enable the prisoner's right to avail of judicial remedies.

e. It is the obligation of the superintendent of jail to see that the family members of the convict receive the message of communication of rejection of mercy petition in time.

(viii) Mental Health Evaluation**:** There should be regular mental health evaluation of all death rowconvicts and appropriate medical care should be givento those in need.

(ix) Physical and Mental Health Reports: Once the mercy petition is rejected and theexecution warrant is issued, the Prison Superintendent must verify

the physical and mental condition of the convict. If the convict is found not fit, the execution should forthwith be stopped. After stopping the execution, the convict shall be examined by a medical board for a comprehensive evaluation and the report of the same shall be placed before the state government for further action.

(x) Furnishing documents to the convict: Copies of the court papers and judgments must be provided to the prisoner within a week by the prison authorities to assist in making mercy petition and petitioning the courts.

(xi) Final meeting between prisoner and his family: Prison authorities must facilitate and allow a final meeting between prisoner and hisfamily and friends prior to his execution.

(xii) Post Mortem Reports: In the light of dearth ofexperienced hangmen in the country, in every execution postmortem to the body must be conducted.

Though the court gave exhaustive guidelines, the onus to expedite the process seems to be heavily on the Ministry of Home Affairs and no action was suggested against the President for dereliction of highest constitutional duty. It is not to say that such an action needs to be prescribed by the court, but some kind of legislative or administrative initiative is required in this regard.

In *Navneet Kaur* v. *State (NCT) of Delhi*,[12] Navneet Kaur, wife of Devender Pal Singh Bhullar, filed a curative petition praying for commutation of death sentence of Devender Pal Singh Bhullar on the ground of supervening circumstance of delay of 8 years in deciding the mercy petition.

Curative writ was filed due to the fact that the larger Bench in *Shatrughan Chauhan* held that the ratio laid down in *Devender Pal Singh Bhullar* is *per incuriam*. Further in the same case insanity/mental illness was recognized as one of the supervening circumstances for commutation of death sentence to life imprisonment. In view ofthe ratio laid down in *Shatrughan Chauhan* the court in *Navneet Kaur* rightly commuted death sentence of Bhullar to life imprisonment on ground of delay as well as mental illness.

Akin to the above cases *V. Sriharan@ Murugan* v. *Union of India*[13] raises the issues of delay in rejection of mercy petitions of death convicts by the President of India. The mercy petitions of the petitioners to the Governor were rejected on 25.04.2000 and as per the procedure the same petitions were forwarded to the Ministry of Home Affairs, Government of India on 04.05.2000. However, the ministry took 5 years to send these petitions to President for consideration. Thereafter, President did not act for another 5 years 8 months on the recommendations of the Ministry of Home Affairs. Finally, the President, on 12.08.11, rejected these mercy petitions after 11 years of delay.When the matter

12 (2014) 7 SCC 264.

13 AIR 2014 SC 3668.

came before the court it was contended by the respondent that mere delay would not suffice for commutation as the petitioners must establish that he suffered due to delay and as such in this case the petitioners werehaving a good time in prison and did not suffer at all.

However, the Supreme Court pointed out that the delay automatically violates the requirement of fair, just and reasonable procedure and regardless of suffering incurred, the execution of death sentence becomes "unfair, unreasonable, arbitrary and capricious." It is consistently viewed that unreasonable delay by itself amounts to mental suffering and prolonged suspense on the mercy petition makes subsequent execution of death sentence inhuman and barbaric.

As a result the requirement to produce evidence on sufferings of petitioner was not a precondition for commutation and endorsing such view would amount to misinterpretation of the ratio in *Shatrughan Chauhan*. Accordingly death sentence was commuted to imprisonment for life. The court while delivering the judgment held that life imprisonment means imprisonment till the end of one's life, subject to any remission granted by the appropriate government.

Immediately after this judgment several political developments in the State of Tamil Nadu led to filing of a criminal miscellaneous petition by Union of India when the Government of Tamil Nadu proposed to grant remission to seven convicts whose death sentence was commuted to life imprisonment.

In *Union of India* v. *Sriharan @ Murugan*[14] the decision of the Tamil Nadu Government in remitting the life imprisonment of respondent Nos. 1 to 7, who werefacing life sentence was challenged on a ground that once the death sentence was commuted by the Supreme Court, no further remission could be possible by exercising executive power in the same case.

However, this contention was objected by the respondents on the ground that the Supreme Court while commuting the death sentence to life imprisonment expressly held that the power to remit the sentence by appropriate government under section 432 is subject to the procedural checks and section 433A of the code. Commutation of death sentence can fall under the following categories: a) by the appellate court when it deems fit; (b) By executive exercising the powers under articles 71 and 161.

The first contention was that in the first category whether the appellate court has the power to substitute the death penalty for imprisonment for life?,which means imprisonment until the end of life and thereby place this category beyond the application of remission. After careful examination of the verdict in *Swamy Shraddananda*[15]and *Bhagirath*[16]the Supreme Court held that this question required to be decided by a full bench and accordingly referred the matter to a five judges' bench.

The next contention was that in the second category when the power of commutation was once exercised, would it bar the State to further remit the sentence.

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14 (2014) 11 SCC 1.

15 *Swamy Shraddananda* v. *State of Karnataka* (2008) 13 SCC 767.

16 *Bhagirath* v. *Delhi Administration* (1985) 2 SCC 580.

Again after considering several judgments the court held that to decide this contention, decision to the first issue need to be decided. Further, resolving this issue required wider interpretation of Constitution and the code, hence the matter was referred to the constitution bench.

Mercy jurisprudence is a part of evolving standard of decency for prisoners, which is the hallmark of the society. Article 72 envisages no limit as to the time within which the mercy petition is to be disposed of by the President of India. Accordingly, it is contended that since no time limit is prescribed for the President under article 72, the courts may not go into it or fix any outer limit. A perusal of the above case-laws makes it clear that the President/Governor is not bound to hear a petition for mercy before taking a decision on the petition. The manner of exercise of the power under the said articles is primarily a matter of discretion and ordinarily the courts would not interfere with the decision on merits. However, the courts retain the limited power of judicial review to ensure that the constitutional authorities consider all the relevant materials before arriving at a conclusion. The decisions of the Supreme Court in these cases do not amount to a review on pardoning power under article 72 and 161. By looking at the seriousness of the nature of failure of exercising such a high constitutional obligation it is high time the executive prescribes time bound disposal of clemency petitions.

Contempt

The Supreme Court is a court of record and by virtue of it, the court can exercise the contempt jurisdiction. It is well settled law that Supreme Court can punish not only for contempt of itself but also of other courts.[17] Exercise of such a power is necessitated to maintain the integrity and independence of judiciary. The nature of the power to punish for contempt was raised before the Supreme Court in *Sudhir Vasudeva* v. *M. George Ravishekaran*.[18] Explaining the nature of power to punish for contempt, the court held that it is a rare and a special power that needs to be exercised cautiously. The exercise of this power is a process of self determination of the issue; is a sacred duty of the court and hence entails greatest care and caution. Relying upon its earlier judgments, the court prescribed the following parameters while exercising such power.[19] In a contempt petition the concerned court should not go beyond the four corners of the order which is alleged to be violated. Further, only those directions which are explicitly mentioned in the order shall be taken into consideration in deciding the disobedience. The idea of contempt jurisdiction is twofold, one to make sure the orders of the court are implemented and the second one is to protect the independence and sanctity of the judiciary. Therefore, the court may use contempt jurisdiction while keeping in view the other correctional remedies available for the petitioners such as review and appeal which may serve the purpose. The decision in *Sudhir Vasudeva* clearly establishes such a notion by holding that in a contempt petition it is not permissible

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17 See *Delhi Judicial Services Association* v. *State of Gujarat*, AIR 1991 SC 2763.

18 (2014) 3 SCC 373.

19 *Jhareswar Prasad Paul* v. *Tarak Nath Ganguly* (2002) 5 SCC 352; *V.M.Manohar Prasad* v. *N. Ratnam Raju* (2004) 13 SCC 610.

for the court to issue further directions as such power could be exercised in other appropriate jurisdiction.

III ORIGINAL JURISDICTION OF SUPREME COURT ARTICLE 131

Article 131 of the Constitution confers original jurisdiction to the Supreme Court in any dispute, between the Government of India and any state or states on one side and one or more other states. However, exercising such jurisdiction is barred if the dispute arises out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument entered into or executed before the commencement of the Constitution and continued to be in operation. A similar expression is also found in article 363. Article 363 bars the jurisdiction of all the courts including Supreme Court to deal with any dispute arising out of a treaty or agreement entered before the commencement of the Constitution by any ruler of an Indian state and to which the Government of the Dominion of India or any of its predecessors government was a party and continued in operation after such commencement.

In State of *Tamil Nadu* v. *State of Kerala*[20] the dispute regarding the safety of Mullaperiyar dam was raised between the States of Tamil Nadu and Kerala. Mullaperiyar dam was constructed pursuant to the Periyar Lake Lease Agreement dated 29.10.1886 across Periyar river. The lease Agreement was entered between the Maharaja of Travancore and the Secretary of State for India in Council. At present the dam is situated at Thekkady District in Kerala and is owned and operated by the Government of Tamil Nadu. When the case was filed in Supreme Court under article 131 as interstate dispute, the question that was raised was that whether the jurisdiction of the court was barred as per articles 131 and 363 of the Constitution as the agreement was a pre-constitution agreement. The court after referring to its earlier cases held that the disputes that are barred from the interference of the courts are those which are of political nature. Any dispute regarding such documents is non-justiciable. The object behind enacting articles 363 and 131 is to enable the Indian rulers to be bound by treaties, agreements, covenants, engagements, sanads or other similar instruments entered into or executed before the commencement of the Constitution. Therefore, only political documents are exempted from the interpretation of the court. However, it cannot take away the jurisdiction of the Supreme Court in respect of the dispute arising out of an ordinary agreement. The present suit was filed to claim a legal right under a lease deed executed between the Government of the Maharaja of Travancore and the Secretary of State for India in council. The said agreement in dispute being non-political in nature it is not barred by the proviso to article 131 of the Constitution and hence cannot curtail the jurisdiction of the Supreme Court.

Special leave to appeal article 136

Article 136 of the Constitution confers a special jurisdiction on the Supreme Court and in a sense it operates as a residuary power. Special leave to appeal,

20 AIR 2014 SC 2047.

being an extraordinary power is beyond any limits, both substantial and procedural. The court exercises this power in its discretion and sky is the limit when injustice is caused. The question that was raised in *Sumer Singh* v. *Surajbhan Singh* [21] was that the power exercised under article 136 is analogous to section 379 of the Cr PC and thereby whether article 136 is restricted in view of section 377 of the code. Further when the court grants special leave to the state for enhancement of punishment given by the lower court, the question whether the accused be allowed to plead setting aside of the conviction all together, was also raised in this case.

Answering in negative, the court held that an appeal under article 136 is not the same as a statutory appeal under the Cr PC. Jurisdiction under article 136 is exercised in exceptional cases where the court deems necessary to prevent grave injustice to the parties. As a result the power of the court cannot be restricted by any procedural requirements that are usually applicable to the lower courts.

Exercise of jurisdiction under article 136 of the Constitution is limited by its own discretion. Once such discretion is exercised, questioning the methodology of exercising such power would not remain in the hand of the parties. The requirement of fair procedure under article 21 is inbuilt into the provision of article 136. Therefore, if the state approached the Supreme Court under 136 for enhancement of the punishment, it is pure discretion of the court to grant the special leave or not. However, once such leave was granted the state cannot raise an objection that the accused was not entitled to plead for setting aside the lower court's conviction. The court rightly pointed out that, once the leave was granted it is the discretion of the court to allow any plea to remove injustice.

IV POWER OF THE SUPREME COURT TO PROVIDE COMPLETE JUSTICE ARTICLE 142

Article 142 empowers the Supreme Court to provide complete justice and to do so it has unlimited powers. Does such power include prescribing procedure in investigating the crimes? In *State of Karnataka by Nonavinakere Police* v. *Shivanna @ Tarkari Shivanna*[22] the Supreme Court observed that in spite of fast track courts there was no fast track procedure followed during investigation of rape and gang rape cases. Therefore, the question that needs to be answered is whether the court could issue necessary interim orders till the Cr PC is amended to include fast track procedure. Accordingly notices were issued to Union of India, Law Commission of India and all the state law commissions and the law secretaries of the states for eliciting their views on the subject. After considering the views of all stake holders the Supreme Court held that it was an appropriate case to issue interim order by exercising powers under article 142 of the Constitution and issued the following directions to all the police station in charge in the entire country.

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21 (2014) 7 SCC 323.

22 (2014) 8 SCC 916.

(i) Upon receipt of information relating to the commission of offence of rape, the Investigating Officer shall take immediate steps to take the victim to any Metropolitan/preferably JudicialMagistrate for the purpose of recording her statement under Section 164 Cr PC. A copy of thestatement under Section 164 Cr PC should be handed over to the Investigating Officer immediately with a specific direction that the contents of such statement under Section 164 Cr PC should not be disclosed to any person till charge sheet/report under Section 173 Cr PC isfiled.

(ii) The Investigating Officer shall as far as possible take the victim to the nearest LadyMetropolitan/preferably Lady Judicial Magistrate.

(iii) The Investigating Officer shall record specifically the date and the time at which he learntabout the commission of the offence of rape and the date and time at which he took the victim tothe Metropolitan/ preferably Lady Judicial Magistrate as aforesaid.

(iv) If there is any delay exceeding 24 hours in taking the victim to the Magistrate, theInvestigating Officer should record the reasons for the same in the case diary and hand over acopy of the same to the Magistrate.

(v) Medical Examination of the victim: Section 164 A CrPC. inserted by Act 25 of 2005 in CrPC. imposes an obligation on the part of Investigating Officer to get the victim of the rapeimmediately medically examined. A copy of the report of such medical examination should beimmediately handed over to the Magistrate who records the statement of the victim under Section164 CrPC.

An important question regarding the jurisdiction of the Supreme Court was raised in *Subrata Roy Sahara* v. *Union of India*.[23] The question raised was whether the court has jurisdiction to order the arrest and detention of the petitioner Mr. Subrata Roy Sahara. The contention was that the said order of the Supreme Court suffers from jurisdictional error. However, the previous order of the court was challenged by the petitioner by filing a criminal writ petition.[24] Hence the preliminary objection that was raised was whether the Supreme Court can admit the petition when such a petition did not mention the provision of the Constitution under which the petitioner challenged the previous order of the Supreme Court.

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23 (2014) 8 SCC 470.

24 A contempt petition was filed against the petitioner in this case for not honouring the judgment of Supreme Court on Aug. 31, 2012 and the orders passed by on Dec. 05, 2012 and Feb. 25, 2013 by the three judge bench. Supreme Court in exercise of the powers conferred under articles 129 and 142 of the Constitution of India ordered the detention of petitioner and send him to judicial custody at Delhi, till the next date of hearing.

The petitioner argued that the court had jurisdiction to decide such a petition under the maxim *"Ex debitojustitiae"*[25] which means "we must do justice to him". The idea behind such a maxim is that, 'if a man has been wronged, so long as it lies within the human machinery to rectify that wrong must be remedied'. He also relied upon "*actus curiae neminem gravabit*" which means "an act of the court shall prejudice no man". Therefore, when a judicial order is passed in derogation of the constitutional limitations or in violation of principles of natural justice, it can be remedied by Supreme Court under *ex debito justitiae*. While exercising the power under this maxim the apex court shall not be constrained by the formalities such as the petition was a review petition or a curative petition.

Explaining the jurisdictional limits of the court, it was rightly said that "prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular Court".

It was held that as the petitioner could not establish any legislative or constitutional provisions that curtail the jurisdiction of the Supreme Court in passing the detention order, it shall be deemed to be passed by legitimate exercise of its jurisdiction. As a result the principle of *actus curiae neminem gravabit* was not available to the petitioner.

Regarding the maintainability of the writ petition, it was held that it was a settled law that the Constitution provides sufficient remedies available to an individual by way of article 137 under which a review petition could be filed for the correction of an error apparent on the face of the record. Further in *Rupa Ashok Hurra's*[26] case the Supreme Court also provided a further remedy by way of a curative petition after a review petition had been dismissed. Moreover, the court being a court of record under article 129 and exercising powers under article 142 has unlimited jurisdiction to correct the mistakes committed by it. However, the petitioner has not chosen either of the above jurisdictions and termed the present petition as a criminal writ petition. Hence the petition was not maintainable.

The next question, whether a writ petition can be filed to challenge the previous judgment of the Supreme Court was answered in negative. It was held that petitioner had no right to approach the Supreme Court under article 32 challenging the previous judgment of the Supreme Court as violation of any fundamental right.[27]

Apart from the maintainability of the case, Supreme Court raised an important issue of awarding compensation to the succeeding party in frivolous cases like

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25 Reliance was placed on *Antulay* v. *R.S. Nayak* (1988) 2 SCC 602.

26 *Rupa Ashok Hurra* v. *Ashok Hurra* (2002) 4 SCC 388.

27 Previously Supreme Court had entertained a challenge to earlier orders passed by it, under article 32 of the Constitution of India, in *M.S. Ahlawat* v. *State of Haryana* (2000) 1 SCC 278 case and *Supreme Court Advocates-on-Record Assn.* v. *Union of India* (1993) 4 SCC 441 case. However, it was held that these two judgments cannot be relied upon, because in the aforesaid two cases, the maintainability of the petitions was not contested.

this. The fundamental question was why a litigant be allowed to suffer from the delay caused to him by the other litigant filing frivolous complaint and using the legal system for dragging the case on and on. The court made a suggestion to the legislature to formulate a mechanism by which a litigant who continues litigation senselessly pay for the loss caused to the succeeding litigant. This suggestion was made by the court neither to deter the people from approaching the court nor to deny access to justice. Rather it aimed at curbing the pattern of prolonging and endless litigations. The suggestion *per se* seems to be a good idea as securing justice through court mostly depends on the survival capacity of the litigant, which a rich litigant can afford for in the years of litigation.

It is evident from the above judgment that both articles 129 and 142 provide ample power to the Supreme Court to compel any person to obey its orders. This power is a corner stone of the jurisdiction of the Supreme Court. Article 142 clothes the court with unlimited power and at the same time a constitutional obligation to compel any one to abide by its orders, if necessary.

V LEGISLATIVE PRIVILEGES

Legislative privileges were recognized by the Constitution to ensure that the members of the legislature shall exercise their duties without fear and persecution. As a result, the members enjoy higher degree of immunity and wider scope of liberty. Privileges are also necessary for the House to establish its authority and to protect its dignity. However, such privileges cannot be used to protect the wrong deeds of the members. In *Justice Ripusudan Dayal* v. *State of Madhya Pradesh*,[28] the petitioner was appointed as Lokayukt of Madhya Pradesh under the provisions of the Madhya Pradesh Lokayukt Evam Up- Lokayukt Act, 1981. Upon receiving a complaint about the irregularity in certain construction related activities in the vidhan sabha of State of Madhya Pradesh involving an expenditure of about Rs. 2 crores, the Petitioner examined the same and found that it is afit case to be sent to the Special Police Establishment (SPE) for taking action in accordance with law. Accordingly, criminal case was registered against the secretary and deputy secretary of vidhan sabha, the then administrator, superintendent engineer, capital project administration and contractors. In response to the said case, the petitioner received letters alleging breach of privileges under Procedures and Conduct of Business Rules 164 of the Madhya Pradesh Vidhan Sabha. These letters were issued not only against the petitioner but also against the officers of the SPE. Immediately after receiving such letters, the Secretary, Lokayukt sent a reply explaining the facts and circumstances in which the case was registered and also stated that there was no situation wherein the breach of privilege of the House or its members could be made out. Further, the secretary also in his letter pointed outthat neither had they received any complaint against the speaker of the Assembly nor any inquiry was ordered to be conducted and that his name was not mentioned in the FIR.

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28 AIR 2014 SC 1335.

However, the secretary, vidhan sabha sent six letters stating that the replywas not acceptable and that individual repliesshould be sent by each of the petitioners. Aggrieved by the initiation of action by the speaker for breach of privilege, the petitioners filed a writ petition under article 32 alleging the violation of their fundamental rights.

A preliminary objection on maintainability of the writ was raised by the respondents arguing that no privilege proceedings were initiated against the petitioners, therefore, it is premature to approach this court under article 32. Rejecting the objection it was held that the court is within its power to grant relief under article 32 read with article 142. It was observed that "if the petitioners are compelled to face the privilege motion in spite of the fact that no proceeding was initiated against speaker or Members of the House but only relating to the officers in respect of contractual matters, if urgent intervention is not sought for by exercising extraordinary jurisdiction, undoubtedly, it would cause prejudice to the petitioners."

With regards to the question whether the privileges are available only to the members of the house or even to the officers who are working in the House, the court categorically held that the privileges cannot be claimed by the administrative staff of the Assembly. Explaining the true nature of the privileges enjoyed by the members of the legislature, the court said that these privileges are available to enable the members to freely perform their functions in the House. Therefore the privileges would apply only to the members to discharge their duties in the House and the same cannot be extended to the activities undertaken outside the House. The activities outside the House are to be treated at par with the other citizens and legislative provisions would apply to them without any differentiation.

With regard to the question whether an enquiry or investigation into an allegation of corruption against some officers of the legislative assembly would amount to interference with the legislative functions of the assembly, the court rightly said that no one enjoys any privilege against criminal prosecution and the only privilege enjoyed by the members is that when they are arrested or detained, the House has a right to be informed of the same. As in this case there is no investigation against any member of the House and no such arrest was made by the investigating agency and hence no question of breach of privilege of the House arises. Further, any investigation against the officers who happen to be working in the office ofthe speaker of the legislative assembly would not amount to interference with the affairs of the House. These officers not being members of the House cannot enjoy any privileges and as a result the provisions of the Lokayukt Act, 1981 do not cease to apply tothem. Thus, it is amply clear that, legislative assembly has no privilege to extend the immunity to its officers fromthe operation of laws.

In *Mohd. Saeed* v. *State of U.P,*[29] an amendment to Uttar Pradesh Lokayukta and Up-Lokayuktas Act, 1975 passed in 2012 to extend the time of lokayukta

29 AIR 2014 SC 2051.

from 6 years to 8 years was challenged as violation of Constitution of India as the same was wrongly introduced as a Money Bill in clear disregard to the provisions of article 199. The question that was raised in this case was whether a Bill can be challenged as *ultra vires* tothe provisions of the Constitution of India on the ground that it was wrongly certified by the speaker as a 'Money Bill', after it was passed by the legislature and assented to by the governor. If it was in fact an ordinary bill and since the procedure for an Ordinary Bill was not followed could the entireaction be treated as unconstitutional and violative of article 200?

The contention of the respondent was that the claim of thepetitioner was barred by the constitutional provisions as the decision of the speaker was final and the legislative process cannot be challenged in view of articles 199(3), 212 and 255. Further it was brought to the notice of the court that in two occasions *i.e.,* in the year 1981 and 1988 amendments were made to the same Act and both the amendments were introduced in the House as Money Bills and the same was not disputed.

After careful examination of the provisions cited above, the court held that the decision of the speaker is final in deciding whether a Bill is a Money Bill or not. The House enjoys privilege of non-interference by the courts in its proceedings. Passing of a Bill in the House is an integral part of its proceedings and in view of article 212 courts cannot interfere with the presentation of a Bill for assent to the governor on the ground of non-compliance with the procedure for passingof Bills. As a result, the validity of the proceedings inside the House cannot be questioned on the ground of violation of rules of business of the House.

Explaining the powers of the speaker, it is opined that under article 199(3), the decision of the speaker of the legislative assembly is final in determining the nature of the Bill and hence such decision cannot be questioned in any court of law. In *Raja Ram Pal* v. *Hon'ble Speaker Lok Sabha*[30] the Supreme Court had held that a limited judicial review was available against the decision of the speaker when such decisions were tainted on account of substantive or gross irregularity or unconstitutionality, the validity of the impugned Act in *Mohd. Saeed* was protected by article 255 as the assent was given by the governor. The Constitution bench of Supreme Court in *M.S.M. Sharma* v. *Shree Krishna Sinha*[31]and *Mangalore Ganesh Beedi Works* v. *State of Mysore*[32] already settled the law that the validity of an Act cannot be challenged on the ground that it violates article 199 and the procedure laid down in article 202.The proceedings before the House cannot be questioned for alleged irregularity of procedure as per article 212 and article 255 lays down that the requirements as to recommendation and previous sanctionare to be regarded as a matter of procedure only.

Consequently, no court can review the internal proceeding of the legislature and any such irregularity has to be questioned in the House itself. Hence the members of the state legislative assembly should have raised these issues in the

30 (2007) 3 SCC 184.

31 AIR 1960 SC 1186.

32 AIR 1963 SC 589.

House when the Bill was pending. An ancillary question that was raised in the case was that when the parent Act was not passed as a Money Bill can the subsequent amendment be passed as a Money Bill? The court held that there was no such bar that if the original Act was not a Money Bill, amendment to the Act cannot be passed as Money Bill.

Legislature could be zealous about protecting its own privileges. Interference of any other organ with its functioning could be viewed as violation of theory of separation of powers. Further, legislature is the only organ that is directly elected by the people, it has people's mandate to rule the country. Though these issues do have some impact on the merits of the argument that legislature cannot be equated with other two organs and must be given considerable free hand, however such privileges cannot be used to shield the House and its members from the abuse or misuse of power. *Justice Ripusudan Dayal*[33] case is a classic example of misuse of privileges.

VI APPOINTMENT OF JUDGES

Independence of judiciary is not only a desirable content for a successful and meaningful democracy but also a constitutional mandate in India. The structural independence such as conditions of appointment, removal and working conditions were expressly taken care of by the Constitution. However, the interpretation of word 'consultation' as 'concurrence' by the apex court had taken the structural independence to the highest level wherein the role of the legislature and the executive in appointment of judges was reduced to mere nominal. In spite of such embroidered power conferred to the collegium, the problems regarding selection of judges to the high court and Supreme Court continues to emerge.

The extent of judicial review over recommendations made by the collegium in appointing the high court judges was raised in *Registrar General, High Court of Madras* v. *R. Gandhi*.[34] The collegium of the High Court of Madras recommended 12 persons comprising of ten advocates and two district judges for consideration by the collegiums of Supreme Court for appointment as judges to the High Court of Madras. The respondent in this case Mr.R. Gandhi, Senior Advocate, filed writ petition before the High Court of Madras to call back the said list from Union Government and Supreme Court of India on the ground that the persons whose name were recommended were not suitable for elevation asper his assessment and other members of the Bar.

Further, he contended that the chief justice and first senior most judge in the collegium of the high court are not originally from Tamil Nadu and therefore they were unable to understandand appreciate the complex social structure of the State of Tamil Nadu and as a result the names recommended did not represent all castes.The division bench of the High Court of Madras entertained the writ petition and passed an order to maintain the status quo, and also restrained Governmentof Tamil Nadu from making any recommendation in this regard. This order was

33 *Supra* note 28.

34 2014 (3) SCALE 412.

challenged in the Supreme Court under article 136 and a separate writ petition was also filed before Supreme Court requesting the court to restrain the high court from further dealing with the case. The reason for such a request was that during the proceedings before the high court, one of the high court judges entered the court room and made certain suggestion to the bench hearing the case which resulted in commotion in the court and as a result there was no conducive atmosphere to continue the case in the same court.

This case raises several potential questions on appointment of judges which as follows:

1. What is the extent of judicial review on the recommendation of the Collegium?

2. Whether the Collegium ought to consider the caste and religion while recommending the names to maintain equilibrium?

3. Could a judge be allowed to appear before the bench and make suggestion *suo motu*?

Answering the first question, the Supreme Court held that no judicial review was available to assess the suitability of the candidates recommended by the collegium. Relying on *Supreme Court Advocates-on-Record Assn.* v. *Union of India*,[35]and *In re Special Reference*[36]it was held that judicial review on recommendations of the collegium was limited only to verify the eligibility of the candidates and proper consultation. Once there was a proper consultation by the chief justice with other members of collegium no judicial review is possible on the list of the candidates recommended. Hence, the High Court of Madras committed an error in accepting the writ and there by granting interim relief. With regard to equal representation, it was clarified that social background was not the only factor but other factors such as practice, intellect, character, integrity, patience, temper and resilience were also considered for recommendation. It was further held that "The issue of a broad representation has alsoto be looked into from the point of view that it is necessary to ensurethat a more representative Bench does not become a less able Bench."

Supreme Court expressed concern over the behaviour of the sitting judge in making *suo motu* suggestion during the proceedings of the writ petition before the High Court of Madras. In unequivocal word the court said that "The sudden unfamiliar incident made us fume inwardly on this raw unconventional protest that was unexpected, uncharitable andungenerous, and to say the least it was indecorous. In ordinary life such incidents are not reviewed with benevolence or generosity, buthere we are concerned with a larger constitutional issue of the justiciability of the cause."

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35 (1993) 4 SCC 441.

36 (1998) 7 SCC 739.

Since judicial review was not available over the recommendation of the names by the collegium, the court did not find the need to respond to the unusual behavior of the judge. This is more so because the issue of judicial review could be disposed of without investigation into the unusual conduct of the judge. As a result, the court opined that the question regarding the conduct require a more seriousjudicial assessment if required in future and therefore, left entirely open. However, the court warned that it expects immense dignity from the judges and weaknesses or personal notions should not be exposed to affect judicialproceedings. Judges need to take judicial notice of only such facts that may be necessary to decide an issue.

Perpetuation of caste system pose a greater threat and this case establishes how deep rooted is the caste system in India. Further, such kind of behavior of the sitting judge would seriously challenge the notion of impartiality and integrity of the judge.

VII WRIT JURISDICTION ARTICLE 226

Writs provide highest safeguards for the rights of people and article 226 confers such a power on the high courts in India. Writs play a very important role in ensuring constitutional governance. With the increase in the role of the state, writs act as a catalyst for accountability and provide assurance of justice. Further, the reach of the writs extended effectively to the common man by decentralizing writ jurisdiction to the high courts. The frequency in using such jurisdiction not only confirms such a notion but also generates the question of propriety of its exercise very often.

In *Chennai Metropolitan Water Supply and Sewerage Board* v. *T.T. Murali Babu*[37] the respondent was absent from duties for about one year and seven months without any intimation and did not respond to the repeated reminders. When he tried to rejoin the duties with a medical certificate an enquiry was conducted and on the recommendations of the enquiry committee he was dismissed from the services. Appeal was also unsuccessful. Later he approached the high court under article 226 challenging his dismissal. On appeal the single judge directed reinstatement on the ground that there was no past misconduct of desertion/absence and, therefore the punishment of dismissal from service for the first time desertion/ absenteeism is too harshand disproportionate.

An appeal to division bench was preferred and the division bench concurred with the single judge. On appeal to Supreme Court one of the considerations was that of the nature of jurisdiction of the high court under article 226. It was reiterated by the Supreme Court that the power of the high court under article 226 of the Constitution is discretionary and hence must be exercised judiciously and reasonably.

A person approaching a high court under article 226 of the Constitution, either against the state or anybody else on the allegation of infringement of his

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37 AIR 2014 SC 1141.
38 (2014) 4 SCC 453.

legal right, must possess un-blameworthyconduct. The court would refuse to grant the relief tothose persons who approach the court with unclean hands or blameworthy conduct. The jurisdiction under article 226 of the Constitution being discretionary, the court would not assist the tardy and the indolent or the acquiescent and the lethargic. The fact that the respondent in this case approached the high court after four years of delay, explain the consequences of such delay. Supreme Court held that though high court being a constitutional court though under the obligation of protecting the rights of the citizens, it cannot ignore the fact of delay.

If an aggrieved person approached the court at his own leisure or pleasure the court must scrutinize whether the *lis* at a belated stage should be entertained or not. As in the present case the respondent employee was careless to his duty and his unauthorized absence on the pretext of ill health shows lackadaisical attitude to the responsibility. Therefore accepting his petition after such delay does not foster the cause of justice. In fact accepting his petition would on the contrary brings in injustice, for it is likely to affect others. Therefore, it was held that delay in approaching the high court is unjustifiable and as a result high court was wholly unjustified in entertaining the writpetition after a lapse of four years.

In *KM. Hema Mishra* v. *State of U.P.*, [38] two important questions were raised regarding the power of the high court under article 226. The first issue is whether a person can approach to invoke the jurisdiction of the high court for grant of anticipatory bails when section 438 of Cr PC has been specifically omitted and made inapplicable in the State of Uttar Pradesh.

Explaining the nature of the high court's powers, the court said that article 226 confers an extraordinary jurisdiction to the high court which has to be exercised to prevent miscarriage of justice and abuse of process of law by authorities in making pre-arrest indiscriminately. However such an exercise should be used in such a manner to convert proceeding under article 226 into proceedings under section 438 of Cr PC. High court would be free to grant the relief in appropriate cases which have to be left to the wisdom of the court exercising powers under article 226 of the Constitution of India.

The Second issue was whether on the dismissal ofthe writ petition by the court under article 226, the high court could grant interim relief against arrest for a specific period or till the completion of the trial. Supreme Court held that once the writ petition is dismissed under article 226 the question of granting further reliefs do not arise. Therefore, once a writ is dismissed, no interim reliefs can be granted further.

In *Sanjay Kumar Shukla* v. *M/S Bharat Petroleum Corporation Ltd*.,[39] Supreme Court again discussed the power of the high court under article 226. Article 226 being an extraordinary jurisdiction the high court can exercise the same with free hand. However, such a jurisdiction needs to be exercised with care and caution particularly in contractual matters. As matter of practice the court must exercise restraint in commercial matters. Even when such a commercial contract was entered into by the state, the court while exercising its jurisdiction under 226 must satisfy that there is some element of public interest involved.

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39 (2014) 3 SCC 493.

While deciding a case, the larger public interest must be kept in mind and the court shall interfere with such transaction only when it comes to a conclusion that overwhelming public interest requires such interference. Exercising such a caution is necessary due to the fact that intervention by the court inevitably result in delay. Such a delay may result in deprivation of the benefit of aservice or facility to the public and also may cause escalating costs therebyburdeningthe public exchequer. At times such a delay may ultimately result in abandoning the project.

Establishment of National Green Tribunal under National Green Tribunal Act, 2010 paved the way to decide civil disputes regarding environmental pollution expeditiously. Whether such a move takes away the jurisdiction of the high court under article 226 in matters of cancellation of quarry lease was raised in *M/s Shreydeep Stone Crusher* v. *State of M.P.*[40] The High Court of Madhya Pradesh held that the Tribunal's jurisdiction to settle the disputes is restricted only to cases that arise under six enactments[41] mentioned in Schedule I and as there is no mention of termination of lease, the high court is not barred from exercising its jurisdiction.

In *Iswarlal Mohanlal Thakkar* v. *Paschim Gujarat Vij Company Ltd*.,[42] it was held that the high court while exercising its power under article 227 of the Constitution cannot act as an appellate court or re-appreciate evidenceand record its findings on the contentious points. high court can quash the order of the lower court only when there is a serious error of law or the findings recorded suffer from error apparent on record. While exercising jurisdiction under article 227, the high court's power is only to review whether the lower court abused or misused the authority, and whether it departed from the procedures which it ought to have observed. As far as review of decision of the lower court is concerned, the high court needs to evaluate whether such a decision is perverse or irrational or grossly disproportionate to what was required.

In *Jacky* v. *Tiny @ Antony*[43] an important question raised was whether the high court has the power to set aside the plaint and further proceedings initiated on the basis of the plaint in the subordinate court by exercising its power under articles 226 and 227. Explaining the true scope of article 227 the Supreme Court held that, the high court ensures that the subordinate courts exercise their powers within the bounds of their authority. However, when such authority was exercised by the lower courts within the bounds of their jurisdiction, high court cannot interfere. Further, articles 226 and 227 cannot be exercised in pure private matters between landlord and tenant. When a suit is not maintainable in a lower court, a petition under article 226 or article 227 is maintainable and the high court is justified

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40 AIR 2014 MP 49.

41 The Water (Prevention and Control of Pollution) Act 1974; the Water (Prevention and Control of Pollution) Cess Act, 19771; Forest (Conservation) Act, 1980; Air (Prevention and Control of Pollution) Act 1981; Environment Protection Act, 1986 and the Biological Diversity Act 2002.

42 (2014) 6 SCC 434.

43 AIR 2014 SC 1615.

in exercising its power. However, neither article 226 nor 227 confer any power on high court to set aside a plaint. No such power to question the plaint is given under articles 226 and 227.

As the high court's jurisdiction under article 226 and for that matter article 227 is wide, it needs to be exercised with care and caution. The above cases clearly establish that though public interest is a ground on which the high court could intervene in the matter, such an intervention is not unbridled.

VIII APPOINTMENT OF JUDGES AND ADMINISTRATIVE STAFF IN SUBORDINATE COURTS ARTICLE 233 AND ARTICLE 229

Minimum age for appointment to district and sessions judge was raised in *Sasidhar Reddy Sura* v. *State of Andhra Pradesh*.[44] In this case the petitioner was denied appointment as a judge of district and sessions court on the ground that he had not completed 35 years of age at the time of advertisement for the said post. The contention of the petitioner was that neither article 233 nor Andhra Pradesh State Judicial Service Rules prescribed minimum age. The rules prescribed only a maximum age and the requirement of minimum age of 35 was a recommendation made by Shetty Commission J which was not incorporated in the rules. Therefore, it was contented that in the absence of express incorporation of minimum age in the rule, his appointment cannot be denied. Accepting the contention, the Supreme Court held that any recommendation made by a Commission cannot be relied on in the absence of incorporation of the said recommendation in the rules.

Appointment of judges is a matter of crucial concern in securing justice. The courts which are considered as temples of justice are manned not only by the judges but also the various administrative staff. These are the persons who are involved in justice delivery system in the true sense. Therefore, a systemic excellence in appointing judges alone would not necessarily result in effective administration of justice. Same systemic excellence is also required in appointments of administrative staff particularly in subordinate courts which are the first point of contact for the general public.

The issue regarding appointment of administrative staff in subordinate courts was raised in *Renu* v. *District & Sessions Judge, Tis Hazari*.[45] Though the issue was initially relating to the ad-hoc appointment of class IV employees in all courts in Delhi including the high court, the Supreme Court in view of several complaints on irregularities in recruitments of such staff in other States as well, *suo motu* issued notices to all registrars of high courts in the states.

The two fundamental issues raised were:

1. Why the recruitment be not centralized? and
2. Why the relevant service rules of the entire staff be not amended to make them transferable posts?

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44 AIR 2014 SC 444.

45 AIR 2014 SC 2175.

Appointment of administrative staff is the prerogative of the chief justice of the high court and exercising such a power is necessary for ensuring the independence of the judiciary. This administrative function of the chief justice cannot be open to challenge, except on well-known grounds of abuse of discretion such as discriminatory or *mala fide*, or the like(s).

But, it does not mean that the power of appointment granted to the chief justice under article 229 (1) is uncontrolled. It is subjected to article 16 (1), which guarantees equality of opportunity for all citizens in matters relating to employment. 'Opportunity' means opportunityof employment equally available to all. Further, article 235 of the Constitution confers power on the high court to exercise complete administrative control over the subordinate courts. This power would also extend to control over all staff working in subordinate courts including the ministerial staff and servants.

As a result, the power to appoint the administrative staff in subordinate courts by the chief justice cannot be exercised in an arbitrary manner. These appointments must satisfy the requirements under article 14 and 16 of the Constitution and the rules made by the legislature. Coming heavily on daily labour and casual labour practices wherein these people were subsequently regularized, the court said that such a practice amounts toimproper exercise of discretion. All administrative staff posts in the high court or courts subordinate to it fall within the definition of "public employment". Hence, appointment to such posts shall be made under rules and under orders of thecompetent authority. Exercise to fill up the vacancies at the earliest must start in advance to avoid ad-hoc appointments.

In this regard the following directions were issued to all the high courts:

a. All High Courts are requested to re-examine the statutory rulesand in case any of the rule is not inconformity and consonance with the provisions of Articles 14and 16 of the Constitution, the same may be modified.

b. To fill up any vacancy for any post either in the High Court orin courts subordinate to the High Court, in strict compliance ofthe statutory rules so made.

c. Any appointment made incontravention of the rules would be *void ab-initio* irrespective of the class of the post or the personoccupying it.

d. The post shall be filled up by issuing advertisement in atleast two newspapers and one of which must be in vernacularlanguage having wide circulation in the respective State.

e. Any vacancyfilled up without advertising as prescribed herein above, shall be *void ab-initio* and would remain unenforceable andin-executable except such appointments which are permissible tobe filled up without advertisement, e.g., appointment oncompassionate grounds.

f. Before anyappointment is made, the eligibility as well as suitability of all candidates should be screened/tested while adhering to thereservation policy adopted by the State.

g. Each High Court may examine and decide within six months from the date of judgment as to whether it is desirable to have centralized selection of candidates.[46]

h. To avoid the shortage of staff and to control the menace of ad-hocism, the High Court concerned or the subordinate court as the casemay be, shall undertake the exercise of recruitment on a regularbasis at least once a year for existing vacancies or vacanciesthat are likely to occur within the said period.

Renu case emphasizes the need for reforms in judicial administration not only at the highest level but also at the grassroots level. It is unfortunate that such an issue need to reach the Supreme Court. However, it is heartening to see that Supreme Court has once again stepped in to root out irregularities in appointment and thereby paving the way to eradicate corruption and malpractices in appointment of administrative staff in courts.

Article 243-R

Article 243-R of the Constitution of India prescribes the composition of municipalities and sub-clause 2(b) authorizes the state legislature to make law for the purpose of prescribing manner of election of the chair person. In furtherance of the said article, the State of Haryana passed Haryana Municipal Corporation Act, 1994. Section 37 of the Act provides the rules regarding removal of Mayor and authorizes the state to prescribe procedure for removal of the Mayor. Accordingly, Haryana Municipal Corporation Election Rules, 1994 were framed and as per the procedure prescribed by the rule 75, no-confidence motion against the Mayor can be entertained only after one year from the date of election of the Mayor. The said rule was challenged as violation of article 243-R in *Dushyant Kumar* v. *State of Haryana*.[47] The court held that such a rule was prescribed with a view to provide stability in the democratic system and also to avoid horse trading. Further, article 243-R only authorizes the state to prescribe the procedure for election of Mayor hence the said rule cannot be viewed as violationof the Constitution.

Right to property article 300A

Right to property is one of the most litigative rights in India and had resulted in bringing several amendments to the Constitution. Litigation on the right to property continues even after it was removed from part III of the Constitution. This time the issue was relating to the power of the government to allow the sale

46 Judgment was delivered on Feb. 12, 2014.

47 AIR 2014 P&H 71.

of property under tenancy laws. Tenancy laws are generally passed as part of the agrarian reform and as a result they do not permit transfer of agricultural land for non-agricultural purpose. However, if the government allows by permit such transfer by charging exorbitant amount, would it violate article 300 A of the Constitution of India?

In *Gohil Jesangbhai Raysangbhai* v. *State of Gujarat*,[48] the Gujarat government passed a resolution fixing the rates of premium to be paid to the state government for converting, transferring, and for changing the use of land from agricultural to non-agricultural purposes at 80% of the minimum valuation of land as per the rates contained in the list called as "Jantri". As a result, whatever may be the sale price, the valuation of the land will be done as per the rates in the Jantri, and 80 per cent of such amount will be payable to the state for permitting such a transfer.

Challenging the said resolution, the appellants contended that the land was not given to them by largess of the state but they had purchased it under Tenancy Acts by paying a price. The land having been purchased for a price, the requirement of the payment of consideration at such a high rate amounts practically to expropriation, and is violative of article 300A of the Constitution of India. As per article 300A state shall not deprivea person of his property save by authority of law and the high premium being arbitrary, unreasonable and unconscionable, violates their right to property under article 300 A. Further, they contended that in the light of the judgment in *Nagesh Bisto Desai* v. *Khando Tirmal Desai*[49] the purpose of prior permission from the state is to protect the tenant from exploitation but not for the State to profiteer from such sale. The amount charged by the state was for permitting the transfer and hence such an amount shall be treated as a fee for transfer but not viewed as a tax. Once it is a fee the general principle that fee shall be proportionate must be adhered to.

However, the court relying on earlier decisions held that the amount charged for transfer is neither a fee not a tax. It is a premium for granting the sanction and the purpose of charging such an amount is to discourage sale of agricultural property for non-agricultural use. This is permissible, keeping in view the fact that tenancy laws are welfare laws and tenants purchase these lands at much cheaper rates on a condition to cultivate the land personally. As the benefit was enjoyed by the tenant under the scheme of a law, they must abide by the restrictions imposed by the same law. The contention of unreasonableness of the amount cannot be entertained as the very idea ininsisting upon the premium is to discourage such transfers to non- agricultural purpose and make them unattractive.

As far as the levy of the 80 per cent of the amount is concerned the state government had reduced the levy to 40 per cent based on the earlier judgment therefore it was held that the amount was quite reasonable. With respect to delay in disposing the applications for transfer, the court accepted the contention of the appellants and directed the authorities to decide such applications as far as possible within 90 days from the receipt of the application.

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48 AIR 2014 SC 3687.

49 AIR 1982 SC 887.

Doctrine of pleasure: Article 311

Civil servants hold post during the pleasure of the President. A plain reading of such powers presupposes unreasonableness in determining the tenure of civil servants. But, article 311 provides certain safeguards against arbitrary exercise of such power. In *Risal Singh* v. *State of Haryana*[50] the appellant was an assistant sub-inspector serving in the Department of Police in the State of Haryana, involved in a corruption sting operation in a television channel and dismissed by the government after dispensing with the inquiry asprovided under article 311(2) (b) of the Constitution without giving any reason.

The order was challenged in a writ petition before the high court on the ground that no reason had been ascribed for dispensing with the inquiry under article 311(2) (b). The high court without going into the merits validated the order holding that prompt action was needed. In a special leave petition the Supreme Court set aside the high court order and held that speaking orders while dispensing with enquiry is a must and non-ascribing of reasons would invalidate the order.

Election Commission article 324

Article 324 not only created Election Commission of India but also empowers the commission to supervise and control the elections in India. Free and fair election being the condition precedent for a successful democracy, Election Commission enjoys widest powers in conducting free elections. In *Ashok Shankarrao Chavan* v. *Dr. Madhavrao Kinhalkar*[51]the appellant's election was questioned by the respondent in an election petition before the high court on ground of falsity of return of election expenses and simultaneously a complaint was also lodged before the Election Commission. The high court dismissed the petition filed by the respondent on the ground of want of material particulars. The order of the high court was challenged before the Supreme Court and again this appeal was also turned down by the Supreme Court. The appellant filed a special leave to Supreme Court contending that Election Commission has no jurisdiction to enquire to determine the falsity of the return of election expenses by an elected candidate, especially after a decision is rendered by the high court in the election petition. Rejecting the contention, the apex court held that Election Commission enjoys widest powers in ensuring that the election is free and fair.Stressing on the powers of the election commission, the court opined that in the context of fair and free election for meaningful democracy, in determining the powers of the Election Commission, the court should have liberal approach in its interpretation.

Further, it was held that the proceedings before the Election Commission under section 10A of Representation of Peoples Act, 1951 is different from the jurisdiction exercised by the high court under election petition. This is because Election Commission cannot set aside the election of a successful candidate but can only disqualify the candidate from continuing as a member of a House. It is obvious that the scope of election petition before Election Tribunal (high court)

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50 AIR 2014 SC 2922.

51 (2014) 7 SCC 99.

and the scope of an order of disqualification to be passed under section 10A are entirely different. Therefore, the enquiry conducted by the Election Commission and thereafter disqualifying the appellant for a period of three years cannot be interfered with.

Another important question regarding the fairness of election was raised in *Jafar Imam Naqvi* v. *Election Commission of India*.[52] The basic contention of the petitioner was that the speeches delivered during the election campaign by various leaders of political parties being communal and at times created social disharmony, in addition to restricting the persons from making such speeches, the political parties are also to be derecognized. He also prayed that the Supreme Court must issue directions in this regard. The basic question before the court was whether in public interest litigation it is proper for the court to exercise its power under article 32 to determine the effect and impact of hate speeches in election campaign and give directions to the Election Commission.

After scrutinizing various cases both Indian and foreign, the court clarified that the directions could be issued by it only when there is a total vacuum in the law. However court could play a proactive role when a law already exists in that area to provide effective remedy and the executive is inactive for any reason. The guidelines are given by the court only when there is no law dealing with a particular situation and such guidelines are valid only till the legislature enacts proper legislation.

There is no doubt that hate speeches could have impact on social harmony, but such situations are matter of adjudication under the Representation of People Act, 1951. Relying on *Manohar Joshi* v. *Nitin Bhaurao Patil*[53] and *Prof. Ramchandra G.Kapse* v. *Haribansh Ramakbal Singh*[54] the court held that as there already exists a remedy under Representation of Peoples Act, 1951 it is not appropriate to give directions. Further it was held that when there are already existing lawsto deal with hate speeches during election campaign, it would not be within the constitutional parameters to allow the same as public interest litigation, hence the writ petition was dismissed in *limine*.

Article 341

The question that was raised in *R. Unnikrishnan* v. *V.K. Mahanudevan*[55] was whether a fresh enquiry can be conducted for determination of the caste of a candidate, when the matter was finalized by a judgment of the high court.

In the present case the respondent's status as a member of schedule caste was in dispute. When he approached the High Court of Kerala, the court directed the Tehsildar concerned to issue a caste certificate in his favour. Accordingly, a caste certificate was issued to him and on the basis of the said certificate the respondent was appointed as an assistant executive engineer under a specialrecruitment scheme for SC/ST candidates. Long after the certificate had

52 (2014) 4 SCC 434.

53 (1996) 1 SCC 169.

54 (1996) 1 SCC 206.

55 (2014) 4 SCC 434.

been issued a Full Bench of the Kerala High Court in *Kerala Pattika Jathi Samrekshana Samithy* v. *State* [56]expressed its concern overlargenumber of applications for change of caste and ordered that all such certificates as werecorrected on the basis of such applications after 27th July, 1977 ought to be scrutinized by a scrutiny committee. Based on this order fresh enquiry was conducted and based on the genealogical and documentary evidence available on record it was proved beyond doubt that the respondent could not get schedule case status and hence was terminated from service.The primary contention of the respondent was that once the issue of caste certificate was finally decided by the high court the same issue cannot be reopened as long as the judgment of the high court was effective.

It was rightly held that once a caste certificate issued in favour of the respondent pursuant to the order passed by the high court and the order being final the same can neither be modified nor be interfered with until the order itself was set aside. The judgment in *Pattika Jathi's*case where in the directions issued by the full bench applies only prospectively. The idea of such an interpretation is based on the premise that once a judgment is delivered by a competent court it cannot be interfered with. Even erroneous decisions can also operate as *res judicata* till such judgment is set aside in appeal. Therefore, without setting aside the judgment given by the high court no such fresh enquiry could be constituted and for the same reason termination of the respondent pursuant to the report of the enquiry was not permissible.

Official language article 345

Recently, issues relating to official language have become a bone of contention in many states. The importance of official language is particularly important in the absence of one language as a state language in India. The problem also become complex due to the fact that the State Reorganization Act, largely divided the States on the basis of language spoken by the majority of the section of the people. In *U.P. Hindi Sahitya Sammelan* v. *State of U.P.*,[57] Uttar Pradesh Legislative Assembly declared Hindi as an official Language in 1951 under article 345. In the year 1989 by Amendment Act Urdu was added as a second officiallanguage. Adding of Urdu as a second official language was challenged in this case as violation of article 345. As per article 345 state governments have an option to choose any one of the languages used in that particular state as an official language or choose Hindi as official language even if it is not spoken in the state. However, such option is subject to article 346 and 347. The contention before the court was that once Hindi was chosen by the state as its official language no further language can be chosen by the state as another official language. It indirectly means that the state can exercise its option for any language only when it not going to use option for Hindi.

However, the court refused to accept such an interpretation on the ground that nothing in article 345 suggests that no other languages in use in the state can

56 AIR 1995 Ker 337.

57 2014 AIR SCW 5238.

be declared as official languages in addition to Hindi, as the second official language. Mere explicit mention of Hindi separately, Constitution does not forecloses the state legislature's option to adopt any otherlanguage in use in the state as second official language.The reason for using Hindi as separate is to encourage the states to use Hindi across the country, irrespective of the fact whether Hindi is in use in a particular state or not. Further, there is nothing in the Constitution that suggests that the power under article 345 could be used by the state legislature only once.

The second contention was that the exercise of power under article 345 by the State Legislature is subject to article 347 which expressly mentions that only the President on demand can direct the State to recognize any other language spoken by substantive population in that State, State cannot by its own recognize any language as second official language. Such a direction for recognition is the prerogative of the President.

Again rejecting the contention, the court held that the expression "subject to the provisions of articles 346 and 347 occurring in article 345 does not make article 345 subordinate to articles 346 and 347. The meaning of the expression 'subject to' is that any law made by the legislature regarding recognition of official language shall not violate President's order if any under article 347. If the President issued any direction in this regard, the state legislature cannot act against such direction in any manner. In other words, state legislature shall not exercise its power under article 345 in conflict with the directions issued by the President under article 347. In the light of federal character of our Constitution this judgment is in the right direction as language is a potential issue for disintegration of a country. Imposing any restriction, restraint or impediment for the state legislature in adopting one of the languages in use in the state as an official language under article 345 of the Constitution of India could adversely affect the integrity of the nation.

Further, the court's observation that the scope of article 345 is wider than that of article 347 asserts that to add a language as a second official language in the state, a demand for the same by substantial population of the state as required under article 347 is not a condition precedent. This decision would go a long way in protecting the unity, integrity and the federal characteristic of the Indian Constitution.

Bringing such requirement of article 347 as a necessary condition for the state legislature to exercise its power under article 345 would have adverse effect particularly when the states were reorganized based on the language.

Medium of instruction article 350A

Another area where language becomes controversial is medium of instruction in schools. Experts had advocated for mother tongue as the medium of instruction in the primary level for better learning by a child. Most of the parents like to send their children to English medium schools keeping in view their better prospects. In *State of Karnataka* v. *Associated Management of (Government Recognised Unaided English Medium) Primary & Secondary Schools*[58] Supreme Court tried

58 AIR 2014 SC 2094.

to settle the issue of medium of instruction. In this case the Government of Karnataka by an order prescribed mother tongue as a medium of instruction to class 1 to IV in the year 1989. However, later a corrigendum was issued which said that "normally mother tongue will be the medium of instruction." Both the orders were challenged before the Supreme Court[59] where in the division bench held both the orders as constitutionally valid. Thereafter, the Government of Karnataka issued a new order relating to language policy in the year 1994 and made applicable to both primary and high schools.

Clauses 2 to 8 of the government order which were the bone of contention in the present case,states that the medium of instruction should be either in mother tongue or Kannadain all government recognized schools for 1stto 4th standard. Students are allowed to choose English or any other language as a medium of instruction from 5th standard onwards. Only students whose mother tongue is English can choose English as medium of instruction for 1st to 4th standard. Any school that fails to follow these instructions would be closed down. This new policy was challenged in the present case as violation of fundamental rights under articles 14, 19, 21, 21A, 29 and 30. On the contrary State of Karnataka contended that article 350A, casts a constitutional duty on the state to provide adequate facilities for children of linguistic minorities to have instruction in their mothertongue at the primary level.

Altogether five issues were raised before the Constitutional bench. The first issue was with respect to the meaning of mother tongue and whether it could be the language in which the child is comfortable with, and who will decide such matter?

To answer such a question the court looked at the provisions of the Constitution and found that the word 'mother tongue' was used only in article 350A and no meaning was attributed to it. Therefore, the court relied upon the circumstances in which article 350 A was inserted in the Indian Constitution. Article 350 A[60] was introduced in the Constitution after the report of the State Reorganization Commission, 1955 by way of Constitution (seventh amendment) Act. Part IV chapter I of the report titled, "Safeguards for linguistic groups" insists on the rights of linguistic minorities in the States to have right to instruction in their mother tongue.

When the expression 'mother tongue' was used only in article 350A it means that it shall be the mother tongue of that particular linguistic minority group in a particular state. Hence, the court held that mother tongue would automatically imply that it is the language spoken by that particular linguistic minority group.

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59 *English Medium Students Parents Association* v. *State of Karnataka* (1994) 1 SCC 550.

60 350A: Facilities for instruction in mother tongue at primary state. – "It shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities."

As the Constitution nowhere mentioned that mother tongue means the language in which the child is comfortable with, the court opined that it cannot widen the power of the state and confer authority to use any language other than that is spoken by the linguistic minority as a mother tongue.

Once the meaning of the mother tongue is decided then the second issue was whether right to choose the medium of instruction was a fundamental right and if so whether a student or a parent or a citizen has the right to choose a medium of instruction at primary stage?

To answer such a question one must realize that every individual must be given the freedom to choose their own life and plan according to their volition. As John Stuart Mill had said, 'each individual must be left alone to decide on certain matters and neither society nor State shall interfere with such choices however foolish it may be'. Relying on several judgments on freedom the Supreme Court held that the right to freedom of speech and expression under article 19 (1) (a) of the Constitution guarantees freedom of a child to be educated at the primary stage of school in a language of the choice of the child. Hence state cannot prescribe any medium of instruction even on the ground that it will be beneficial for the child. Therefore, the court said that a child or on his/her behalf his/her parent or guardian has right to choose the medium of instruction at the primary level.

However, court declined to recognize that right to choose a medium of instruction is implicit inthe right to education under articles 21 and 21A of the Constitution as 21A expressly mentions that a child is entitled to right to education in the manner, State may by law determine. Hence, right to choose medium of instruction at primary level is a fundamental right under article 19 (1) (a) and not under article 21 or article 21A of the Constitution.

The third issue was whether the imposition of mother tongue would in any way affect the fundamental rights under articles 29 and 30 of the Constitution? Again after relying on several previous judgments the court pointed out that the Constitution does not mandate that both linguistic and religious minorities under article 29 and 30 should establish educational institutionsfor teaching language and religion only. The true meaning of these articles was that thereligious and the linguistic minoritiesshould have the right to establish educational institutions of their choice. Hence no limitation could be placed on what subjects to teach or what language shall be used as a medium of instruction.

As far as non-minority unaided schools are concerned in the absence of protection under article 29 and 30 the right to choose a medium of instruction squarely falls under article 19(1) (g) of the Constitution .*T.M.A. Pai Foundation* v. *State of Karnataka*[61] already settled the issue of education coming under the purview of expression "occupation" used in Article 19(1) (g). But unlike article 30(1) of the Constitution, article 19 (1) (g) does not have the word "choice". In spite of such difference the court felt that it does not make any material difference as article 19 is titled as "Right to Freedom." The analogy of the court was that the word "freedom" in the heading and the word "any" before the word "occupation"

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61 AIR 1995 SC 1938.

in article 19(1) (g) of the Constitution clearly provides the right to practice any occupation of one's choice which in terms enables any citizen to establish any school and choose any language as a medium of instruction.

Further, though it cannot be denied that both under articles 19 and 30 the state has the power to prescribe regulatory measures, could medium of instruction be such regulatory measures and thereby binding on the schools? In its previous judgment in *Gujarat University* v. *Shri Krishna Ranganath Mudholkar*[62] the Constitution bench has held that primary and secondary education is the exclusive domain of the states to legislate on and hence it is within the power of the State to prescribe the medium of instruction. However, the court made a distinction with the present case and held that *Gujarat University* case does not hold that the power of the state in regulating the education can violate the fundamental rights. Further, it is pertinent to know that Union could prescribe medium of instruction only when it has a direct impact on the standards of higher education. For example Union could impose English as a medium of instruction keeping in view of availability of wide range of educational resources. But such a situation is not there in prescribing mother tongue as medium of instruction in primary education. Moreover there is no evidence to show that the mother tongue would improve the standard of education in 1st to 4th standard, and hence the court held that the imposition of mother tongue affects the fundamental rights under articles 19, 29 and 30 of the Constitution.

Once it is decided that right to choose medium of instruction is a fundamental right the fourth question that need to be answered was whether the term 'Government recognized schools' is inclusive of both government-aided schools and private & unaided schools? Answering in the positive the court held that all schools irrespective of their status need recognition. As a result even unaided schools which have been granted recognition are also included in the term 'Government recognized schools'.

As it was already decided by the court that minorities have a right to have their education in their own mother tongue the moot question that was raised was whether the state can compel the linguistic minorities to choose their mother tongue only as medium of instruction in primary schools under article 350-A. This issue was already dealt under the third question and to make it clear, the court clearly held that article 350A does not empower the state to compel a linguistic minority to provide instructions only in their mother tongue. Such an interpretation would violate the fundamental right under article 30(1). Therefore, state cannot compel linguistic minority's schools to adopt only mother tongue as medium of instruction.

This judgment has far reaching consequences in India particularly in the absence of a national language. It is a bold judgment in view in spite of various experts' opinion that mother tongue should be the medium of instruction. The stand of the Supreme Court is laudable as most of the parents and students like to join in English medium schools keeping in view of the opportunities that are available to them both at national and international level. A country like India

62 AIR 1963 SC 703.

where no single language is practically a national language, making children to learn in their mother tongue would restrict their employability to their own state. Lack of English speaking skills would not only adversely affect the opportunities but also the quality of education as most of the educational resources are available in English. Students coming from English medium educational institutions have an added advantage in the present job market. Therefore this judgment would be a great help particularly when the government policies are more driven by popularity than the rationality.

IX NEW AMENDMENT: THE CONSTITUTION (NINETY-NINTH AMENDMENT) ACT, 2014

Independent judiciary is the back bone of a vibrant democracy. The influence of executive over judicial appointments always cause strains and cast shadow on such independence. However, articles 124 and 217 of the Constitution unequivocally conferred the power to appoint judges of Supreme Court and high court to the executive. The first judges' case in 1981 confirming such authority to the executive specifically held that 'consultation' by the executive with chief justice shall be full and effective.[63] But in the second judges' case, 'consultation' was redefined to 'concurrence' by introducing collegium system.[64] Further the third judges' case, expanded collegium to Chief Justice of India and his four senior-most colleagues and reduced the primacy of the Chief Justice of India in judicial appointments.[65] As a result the executive function of appointment of judges practically became a judicial function at the hands of the higher judiciary. Over 20 years the collegium system successfully kept the political influence in abeyance but according to many, it failed in infusing the merit and preserving the independence in appointments. Several reasons were attributed to such failure like lack of transparency in selection process, favoritism of members of collegium, discarding of merit and blindly following seniority in ranking of the judges of the high courts, no official set up and the whole system of collegium operated on an ad hoc based.[66]Even AP Shah J described the collegium as an undemocratic institution with no checks and balances and opined thateven bringing more transparency would not improve the system.[67]As there is a long standing demand for having a separate body like National Judicial Commission, Parliament passed The Constitution (Ninety-Ninth Amendment) Act, 2014, with a view to establish

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63 *S.P. Gupta* v. *Union of India*, AIR 1982 SC 149.

64 *Supreme Court Advocates-on-Record Assn.* v. *Union of India* (1993) 4 SCC 441.

65 *In re Special Reference* (1998) 7 SCC 739.

66 Fali S Nariman, Needed: Dialogue, statesmanship, *available at*: http:// indianexpress.com /article/opinion/ columns/needed-dialogue-statesmanship/ last visited on Sep. 10, 2014).

67 AP Shah J, If the judiciary is either equal or in a minority, I fear this Bill will be (legally) vulnerable, *available at*: http://indianexpress.com/article/india/india-others/ if-the-judiciary-is-either-equal-or-in-a-minority-i-fear-this-bill-will-be-legally-vulnerable/ (last visited on Sep. 30, 2014).

National Judicial Appointments Commission (NJAC) to deal with judicial appointments in the higher judiciary.

The amended article 124 of the Constitution provides that the judges of the Supreme Court shall be appointed by the President on recommendation of the National Judicial Appointments Commission. The composition of the National Judicial Appointments Commission was provided by inserting a new article 124 A. The commission consists of the following persons:

a) the Chief Justice of India, Chairperson, *ex officio*;

b) two other senior Judges of the Supreme Court next to the Chief Justiceof India —Members, *ex officio*;

c) the Union Minister in charge of Law and Justice—Member, *ex officio*;

d) Two eminent persons to be nominated by the committee consisting ofthe Prime Minister, the Chief Justice of India and the leader of opposition in the House of the People or where there is no such leader of opposition, then, theLeader of single largest opposition party in the House of the People.

Provided that one of the eminent person shall be nominated from amongstthe persons belonging to the scheduled castes, the scheduled tribes, other backward classes, minorities or women. An eminent person so appointed shall hold the office for a period ofthree years and he/she is not eligible for reappointment.

The duties of the commission were laid down in article 124 B. The following are the duties of the National Judicial Appointments Commission

a) Recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts;

b) Recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and

c) Ensure that the person recommended is of ability and integrity.

To give effect to the commission, articles such as 127, 128,217, 222, 227, 224 and 231 were suitably amended.

The National Judicial Appointments Commission Act, 2014 was passed by the Parliament and President gave assent on 31st December 2014. This Act was passed to regulate the procedure to be followed by the commission while recommending persons for appointment as Chief Justice of India and high court, other judges of the Supreme Court and high courts and other matters such as transfers. Section 4 of the Act imposes an obligation on Central Government to intimate any vacancy in judges post in Supreme Court or of a high court, and such intimation shall be made six months prior to the occurrence of the vacancy. If any vacancy occurs due to resignation or death of a judge, the Central Government

shall make reference to commission within a period of thirty days to fill up such vacancy.

Section 5 imposes a mandatory obligation on the commission to recommend the senior-most judge of the Supreme Court as the Chief Justice of India. Only condition for deviation of rule is that the senior most judge is not fit to hold the office. With regard to other judges, the commission is expected to recommend the names based on the ability and merit. In case of appointment of high court judge, apart from seniority, the ability and merit of such judge shall be considered. However, commission shall not recommend a person for appointment if any two members of the commission do not agree for such recommendation.

As far as appointment of the chief justice of a high court is concerned, the Act prescribes that in addition to inter se seniority of high court judges and ability, merit be considered by the commission. In appointing the judges of high court, the commission is required to seek nomination from the chief justice of the concerned high court.

In appointing the judges, the President is bound by the recommendations made by the commission. However section 7 provides that, President may request the commission for reconsideration of the recommendation made by the commission. But, it is mandatory to the President to accept recommendation made by the commission after reconsideration.

Introducing the National Judicial Appointments Commission is a big step towards the right direction. It was observed by T.R. Andhyarujina that except in United Kingdom the working of such commissions were not satisfactory. He particularly referred to the judicial appointments in South Africa and other countries in Africa.[68] Further, he is apprehensive about the working of NJAC as it has to make recommendations for appointments of 31 judges to the Supreme Court and over 800 judges to the 24 high courts. This apprehension seems reasonable by looking at the fact that the Chief Justice of India and two senior most judges of the Supreme Court being the members of the NJAC, would they be able to discharge their primary duty of hearing and adjudication of cases. He is particularly critical by saying that, "(T)he collegium system has not worked, butwe should not have a situation where we jump from the frying pan of the collegium to theburning fire of a chaotic National Judicial Commission."[69]

It is true that NJAC would successfully prevent the political appointment of judges and also judges appointing their own colleagues. Such an attempt seems reasonable and more constitutional than the collegium system; however, it has its own pitfalls. Suhas Chakma identifies four of such pitfalls.[70] First, the commitment

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68 T R Andhyarujina, A case for two commissions, The Indian Express, *available at*: http://indianexpress.com / article/opinion/columns/a-case-for-two-commissions/ (last visited on Oct. 10, 2014).

69 *Ibid.*

70 Suhas Chakma, Four problems (India: National Judicial Appointments Commission Bill - The cure is worse than the disease, *available a*t: http://www.achrweb.org/Review/2014/242-14.html(last visited on Dec.12, 2014).

of Central Government in selection of members of various national commissions is dismal and the same may happen with NJAC.[71] The second drawback that was identified is the absence of any criteria to decide 'eminent person'. The third problem is that if there is any difference among the appointing committee in the appointment of members of the NJAC, there is no provision to resolve the difference of opinion like section 5 (2) of the National Judicial Appointments Commission Act, 2014 wherein the commission cannot recommend a person for appointment if any two members of the commission do not agree for such recommendation. The last objection that he raises is that appointing Chief Justice of India as the ex-officio chairman of the commission creates conflict of interest. Such a conflict could be anticipated when he/she is required to judge the validity of the appointment of the "eminent persons" and also appointment of judges as he/she would be deciding on appointment and transfers of the judges.

There is also a growing concern about the time that would be taken for functioning of the commission. Selecting several judges for appointment to higher judiciary by following rational and fair manner is an arduous task and such a task cannot be fulfilled by an ex-officio body of sitting judges and the ministers. Hence there is a need for an independent body in the lines of Judicial Appointments Commission (JAC) of the United Kingdom for the purpose of scrutinizing the applications and nominations of the candidates as per the criteria that could be developed by the commission.[72]

On a whole, the move of introducing National Judicial Appointments Commission received mixed reaction from the legal fraternity. There seems to be no consensus. Though majority is in favour of removing the power of appointments from the collegium and giving to the NJAC, nevertheless hold several reservations about the existing frame work of the NJAC. The usual mistrust about the role of the executive in constituting and selecting members of NJAC is understandably evident, it would be very interesting to see how things would unfold in near future as the constitutional validity of the amendment and the Act is pending before the Supreme Court.

X CONCLUSION

In every modern state the political power is delegated by the community to the government and at the same time imposes a limitation on exercise of such power. Whatever be the form of the government, such limitations are imposed by

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71 He gives two instances of such appointments. First the Government of India appointed Mr P J Thomas as Chairman of the Central Vigilance Commission, which was set aside by the apex court later. Second, the government went ahead of appointment of Cyriac Joseph J and Mr Sarat Chandra Sinha as members of the National Human Rights Commission despite the objections raised by the leaders of opposition in Lok Sabha and Rajya Sabha.

72 Prashant Bhushan, Lay down Standards of Transparency, Indian Express, *available at:* http://indianexpress. com /article/opinion/columns/lay-down-standards-of-transparency/ (last visited on Nov. 17, 2014).

the Constitution to regulate the relationship between the government and the governed. Therefore, the foundations of political society are based on constitutional limits. But ensuring that the persons in charge of the government abide by these limitations is always problematic as the ends of the constitution and the government is different. The aim of the Constitution is to establish rule of law and to prevent the persons who formed the government from digressionof the principle of rule of law. However, the government which is elected by the people being populist would be more interested in promoting their own policies aimed at preserving their self interest.[73] Balancing of these two ends would be the primary task of the judiciary as legislature and the executive forms an integral part of government.

The survey of judicial pronouncement in this year amply reflects the above. The powers of the President in exercising the pardoning power become contentious every year. Judgments in *Shatrughan Chauhan, Navneet Kaur* and *Sriharan* cases show the balancing between judicial over reach and activism. The reluctance of the judiciary in issuing guidelines on which President may exercise pardoning power though understandable, the absolute absence of guidelines and leaving the matter to the personal choices of the executive caused enough harm to the public trust on rule of law. As a result it is high time the legislature steps in and provide minimum standard operative procedure to reduce the delay and there by restoring faith in rule of law. In the absence of such exercise, tactical delays could be used politically to reduce the death sentence into life imprisonment. *Sumer Singh* judgment reiterates the discretionary power of the Supreme Court in granting special leave and no limitations whether substantial and procedural could be imposed on such power. Article 142 is one of the articles under which the Supreme Court exercised judicial outreach to provide complete justice. *State of Karnataka* is one of such cases where the Supreme Court issued guidelines for fast track procedure to be followed during investigation of rape and gang rape cases. Similarly, *Subrata Roy Sahara* shows that the apex court stands for justice and justice alone is the consideration for remedying any miscarriage of justice. This judgment raised a very fundamental issue of compensating the parties who are victims of prolonged and endless litigations. It suggests that rule of law is not meant for misuse and justice could be assured only to those who could survive the ordeal of a long trial. Two judgments on the issue of language highlights that diversified needs required different judicial approach. Another notable strain in constitutional governance in this year of survey is appointment of judges in high court and administrative staff in the subordinate courts. Both the cases show that even judiciary is not infallible. These cases highlight the need for transparency and accountability in judicial appointments. The 99th amendment to Indian Constitution and the National Judicial Appointments Commission Act, 2014 are two steps towards that direction. But, efficacy of these two initiatives is also in doubt. However means one may criticize; it is an undeniable fact that Indian Judiciary is still a bulwark in limiting administrative abuse of power and in striving for constitutionally limited government.

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73 See, Oren Ben-Dor, *Constitutional Limits and the Public Sphere: A Critical Study of Bentham's Constitutionalism* 137 (Hart Publishing, Oxford – Portland Oregon, 2000).